Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. In 1968, acting under the federal government's order to consolidate air passenger service in North Texas, the cities of Dallas and Fort Worth agreed jointly to finance and construct Dallas-Fort Worth International Airport (**"DFW Airport"**). To comply with federal mandates and assure the feasibility of the new airport, the cities covenanted to transfer existing passenger service to DFW Airport and to limit interstate service at their other airports, including nearby Love Field (located only twelve miles away). **Whether the Fifth Circuit, in conflict with decisions of the Colorado Supreme Court and Second Circuit, erred in concluding that the Airline Deregulation Act, 49 U.S.C § 41713(b)(1), preempts two cities' formal agreement to build and operate a regional airport to accommodate all long-haul passenger service in that region, and to limit other facilities in that area to short-haul traffic and general aviation?**

2. To insure the viability of DFW Airport, the major airlines serving Dallas and Fort Worth were enticed to relocate to DFW Airport through "Use Agreements," which are mutually beneficial contracts between the airlines and the Dallas-Fort Worth Airport Board. **Whether the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1), preempts contractual obligations voluntarily undertaken between airlines and a regional airport board that restrict interstate flights to a new regional airport?**

3. Almost one year after Fort Worth commenced a state court action against Dallas and others to prevent the

## QUESTIONS PRESENTED – Continued

unlawful expansion of services at Love Field, the Department of Transportation ("DOT") initiated an interpretive proceeding to decide the same issues. After the state court entered final judgment, DOT issued an opinion that directly contradicted the state court's judgment. **Whether a federal agency, having failed to participate in a pending state court lawsuit, may initiate an interpretive proceeding involving the same principal parties and legal questions, and then issue a declaratory ruling that contradicts the final judgment previously entered by the state court?**

## PARTIES TO THE PROCEEDING

The following is a list of parties that participated in the proceeding in the Court of Appeals for the Fifth Circuit.

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## PETITION FOR WRIT OF CERTIORARI

The City of Fort Worth, Texas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is not yet reported, but is reproduced at Appendix A (Pet.App. 1). The declaratory and procedural opinions of the Department of Transportation are unreported, but are reproduced at Appendices B (Pet.App. 53) and C (Pet.App. 147), respectively. The final judgment issued by the Texas trial court in a related proceeding is reproduced at Appendix D (Pet.App. 178).

## JURISDICTION

The court of appeals entered its judgment on February 1, 2000, and issued a revised opinion on February 24, 2000 (Pet.App. 1). No petition for rehearing has been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

***The Airline Deregulation Act.*** The pertinent portions of the Airline Deregulation Act ("**ADA**"), 49 U.S.C. § 41713(b), provide:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

***The Wright Amendment.*** Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29 (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft

with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

***The Shelby Amendment.*** Sections 337(a) and (b) of the Department of Transportation and Related Agencies

Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

> SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".

*28 U.S.C. § 1738.* Section 1738 of 28 U.S.C. provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within

the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## STATEMENT OF THE CASE

### A. Introduction.

This case implicates issues of national importance never addressed by the Court, including an airport proprietor's ability under the Airline Deregulation Act to consolidate long-haul scheduled passenger service at one airport and maintain other airports within the same regional system as short-haul and general aviation airports. This petition also involves the authority of a federal agency to commence an administrative proceeding for the sole purpose of contradicting and undermining a final judgment previously entered by a state court involving the same principal parties and issues.

The Fifth Circuit's decision necessitates review by this Court for at least three reasons:

*First,* the Fifth Circuit has made it virtually impossible for states and political subdivisions to establish regional air transportation systems. The Fifth Circuit's decision that the ADA preempts the four-state perimeter rule at Love Field directly conflicts with the opinions of the Colorado Supreme Court in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), and the Second Circuit in *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006

(1988). Both of those courts concluded the ADA does not preempt a local airport proprietor's ability to differentiate between the type and level of service at each airport in a regional airport system.

*Second*, the Fifth Circuit has interpreted the ADA to preempt contractual agreements voluntarily undertaken between airlines and local airport authorities. The Fifth Circuit's decision is contrary to this Court's holding in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995) that the ADA does not preempt self-imposed contractual obligations.

*Third*, the Fifth Circuit has bestowed unprecedented authority upon a federal agency by concluding that an agency may commence its own administrative proceeding to relitigate specific issues between specific parties when the agency disagrees with a prior state court judgment. [Pet.App. 178] The Fifth Circuit's conclusion that DOT was not obligated to accord preclusive effect to a prior state court judgment is inconsistent with decisions from several other federal courts, including *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 20-21 (1st Cir. 1997), *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993), *Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979), and *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967).

**B. Relevant Facts.**

In 1962, the Civil Aeronautics Board **("CAB")** instituted an investigation to determine whether the cities of Dallas and Fort Worth should be required to consolidate commercial passenger service at one airport. [Pet.App. 2] At the time, Dallas and Fort Worth operated independent

and competing airports, including Dallas's Love Field. [Pet.App. 2, 57]

After an evidentiary hearing, CAB issued an order "that service to Dallas and Fort Worth should be required through a single airport." [Pet.App. 2] CAB instructed the cities that if they did not agree on a single airport for all passenger service, it would designate one for them. [Pet.App. 2]

To comply with CAB's mandate, the cities executed a certain Contract and Agreement dated April 15, 1968, which created a joint venture to build DFW Airport. Under the Contract, the cities are co-owners of DFW Airport, which is operated on their behalf by the DFW Airport Board.

To comply with the order that the cities "transition to service through a single airport" and to authorize the issuance of bonds to finance DFW Airport, the cities passed the 1968 Regional Airport Concurrent Bond Ordinance (**"Concurrent Ordinance"**). [Pet.App. 2, 58-61] Pursuant to the Concurrent Ordinance, the Cities jointly have issued nearly two billion dollars in DFW Airport revenue bonds, one billion of which remain outstanding.

Important to this petition is Section 9.5 of the Concurrent Ordinance, which obligates the cities to "take such steps as may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to [DFW]

Regional Airport."[1] [Pet.App. 2-3, 58-61] Section 9.5 also requires the cities to refrain from acts competitive with DFW Airport. [Pet.App. 60]

In the early 1970s, Fort Worth demolished GSIA and the eight CAB-certificated air carriers who were using Dallas and Fort Worth airports signed "Use Agreements" with the DFW Airport Board, agreeing to move their services to DFW Airport. [Pet.App. 3, 57] Southwest Airlines, however, refused to relocate and in *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974), it was determined that Southwest could not be forced to vacate Love Field, as long as Love Field remained open, since Southwest was not a CAB-certificated carrier and was flying only intrastate routes. [Pet.App. 3]

In 1978, ten years after the cities' agreement to build DFW Airport, Congress enacted the Airline Deregulation Act, 92 Stat. 1705. The ADA preempts States and their political subdivisions from exercising *police* or *regulatory* powers with respect to the routes, rates or services of airlines. 49 U.S.C. § 41713(b)(1). However, the ADA exempts from preemption the right of local governments, such as Dallas and Fort Worth, to exercise their powers as *proprietors* of such airports.[2] 49 U.S.C. § 41713(b)(3).

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[1] It has been decided that "Certificated Air Carrier Services" means only scheduled *inter*state and international traffic. *City of Dallas v. Continental Airlines, Inc.*, 735 S.W.2d 496 (Tex.App. – Dallas 1987, writ denied).

[2] When Congress enacted the ADA, there was a specific discussion regarding DFW Airport, Love Field, and the Concurrent Ordinance. Mr. Anderson, the ADA's Floor

In 1979, Southwest applied under a short-lived portion of the ADA, called the Automatic Market Entry Program, to fly between Love Field and New Orleans. [Pet.App. 3] CAB granted the application after concluding it had no power to deny it. [Pet.App. 3]

To avoid further litigation, Dallas, Fort Worth, the DFW Airport Board, and Southwest Airlines agreed to a compromise whereby the cities would allow limited interstate service from Love Field to the four states contiguous to Texas (the "perimeter rule"). To insure CAB would not take action inconsistent with the compromise, Congress enacted the "Wright Amendment,"[3] which embodies the perimeter rule agreed to by the parties. [Pet.App. 3] The Wright Amendment prohibits the CAB/DOT from certificating interstate flights at Love Field, subject to certain exceptions for which certification is permissible (commuter and charter flights, grandfathered flights, and flights to the four contiguous states). [Pet.App. 3-4]

In an earlier decision, the Fifth Circuit found that Congress enacted the Wright Amendment "pursuant to its rational decision to maintain the agreement between Dallas and Fort Worth." *Cramer v. Skinner,* 931 F.2d 1020, 1032 (5th Cir.), *cert. denied,* 502 U.S. 907 (1991). The Conference Report on the Wright Amendment acknowledges that it "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort

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Manager, stated that services at Love Field would not be authorized if inconsistent "with the plan of the . . . Ordinance." 124 CONG. REC. 30,670 (1978).

[3] International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

Worth, DFW Airport authority and related constituent groups." H.R. CONF. REP. NO. 96-716 at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 86. The Conference Report further provides: "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act [now 49 U.S.C. § 41713(b) of the ADA] apply to the authority to serve Love Field on interstate flights authorized by the amendment." *Id.* at 26, 1980 U.S.C.C.A.N. at 88.

The four-state perimeter rule in the Wright Amendment governed the operations at Love Field for almost twenty years. In 1997, however, Congress passed the "Shelby Amendment," which amended the Wright Amendment in two limited respects.[4] [Pet.App. 5-6] First, the Shelby Amendment added Alabama, Mississippi, and Kansas to the four contiguous states listed in paragraph (c) of the Wright Amendment. The Shelby Amendment also provided a new definition for the phrase "passenger capacity of 56 passengers or less" within the "commuter airline exception" contained in paragraph (a)(2) of the Wright Amendment. That exception now allows DOT to certificate large aircraft "reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56."

Even before the Shelby Amendment was enacted, several airlines announced they would institute non-stop passenger service from Love Field to points beyond the four contiguous states. [Pet.App. 7] Because Dallas was

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[4] Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

unwilling to enforce the four-state perimeter rule, on October 10, 1997, Fort Worth filed a declaratory action in Texas state court against Dallas, the DFW Airport Board, and Legend Airlines.[5] [Pet.App. 7] Fort Worth asked the court to declare that Dallas is obligated by the Concurrent Ordinance to limit flights at Love Field to points within Texas and the four contiguous states. Dallas, Legend and Continental defended by claiming Dallas's obligations had been preempted by federal law.

By Partial Summary Judgment dated October 15, 1998, the state court ruled that neither the ADA nor the Wright and Shelby Amendments preempt Dallas's ability to enforce the perimeter rule at Love Field. [Pet.App. 7, 178] The state court's judgment was made final December 16, 1998. [Pet.App. 178] Dallas, Legend and Continental appealed the judgment to the Texas Court of Appeals for the Second District, which temporarily stayed the appeal so that it might consider any immediate opinion issued by the Fifth Circuit in the proceeding described below. [Pet.App. 7] However, prior to the Fifth Circuit's decision, the Texas appellate court lifted its stay and is currently reviewing the state court's final judgment.

On January 31, 2000, in response to Legend's public announcement that it would violate the state court's final judgment, Fort Worth requested the state court to issue injunctive relief against Legend. Fort Worth withdrew its request, however, after DOT filed a federal lawsuit

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[5] *City of Fort Worth v. City of Dallas, et al.*, 48th District Court, Tarrant County, Texas, Cause No. 48-171109-97. Continental Airlines and Continental Express were later added as defendants. American Airlines intervened as a plaintiff.

against Fort Worth seeking emergency injunctive relief to enforce the orders issued in the proceeding described below. DOT requested the federal court to enjoin Fort Worth from enforcing its state court judgment, and to compel Fort Worth to dismiss its state court lawsuit. DOT's federal lawsuit is still pending.

### C. The Proceedings Below.

From the moment the state court litigation began, DOT was kept apprised of its progress by several of the state court litigants. Several parties attempted to persuade DOT to intervene in the state court action. [Pet.App. 15, 16 n.5, 22 n.8, 54] Instead, on August 25, 1998, almost one year after the state court litigation began, DOT commenced an interpretation proceeding to decide the same legal issues. [Pet.App. 8, 16 n.5] On December 22, 1998, DOT issued Declaratory Order 98-12-27, which conflicted with the Texas court's prior judgment. [Pet.App. 8-9, 16 n.5, 53]

Several parties, including Fort Worth, petitioned the Fifth Circuit to review DOT's order pursuant to 49 U.S.C. § 46110. On February 1, 2000, the Fifth Circuit issued its opinion denying the petitions for review and affirming Order 98-12-27. [Pet.App. 1]

## REASONS FOR GRANTING THE PETITION

### I.

### THERE IS AN URGENT NEED FOR THE COURT TO DEFINE AN AIRPORT PROPRIETOR'S RIGHTS UNDER THE AIRLINE DEREGULATION ACT.

The ADA provides for federal preemption of States' and municipalities' *regulatory* and *police* powers, but expressly exempts from preemption the *proprietary* powers and rights of local airport proprietors. 49 U.S.C. § 41713(b); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 637 n.14 (1973) (distinguishing between police and proprietary powers). Through this provision, "Congress expressly provided that the proprietary powers and rights of municipal airport owners are not preempted by federal law." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 982 (9th Cir. 1991).

The Fifth Circuit acknowledged that the ADA allows an airport operator to impose "reasonable, nonarbitrary and nondiscriminatory" restrictions to advance a local interest. [Pet.App. 34] The court concluded, however, that the ADA does not permit the allocation of traffic between two airports for the purpose of maintaining one as a short-haul airport or to protect the financial integrity of another airport. [Pet.App. 37]. The Fifth Circuit's judgment creates a conflict with prior opinions of the Colorado Supreme Court and Second Circuit, which recognize that airport proprietors may implement rules to protect one airport from another in the same regional system.

Most recent is the Colorado Supreme Court's opinion in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), which the

Fifth Circuit acknowledged as a conflicting decision. [Pet.App. 36]. There, the court upheld a prohibition on passenger service at Centennial Airport that was intended to prevent competition with Denver International.[6] That case, like the present one, involved local planning that designated Centennial as a reliever airport for Denver's primary airport, Denver International. Finding that the local regulation was not preempted, the court explained:

> [W]e believe that an airport proprietor's ban on scheduled passenger service falls squarely within the proprietor's exception . . . [A] ban on scheduled service seeks to accomplish a more fundamental goal in setting the boundaries of permissible operations at the airport. The power to control an airport's size exists at the core of the proprietor's function. . . .

*Id.* at 595-96.

The other leading decision is *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, in which the Second Circuit decided the exact statutory issue presented here: whether the ADA's proprietary rights exception permits a local airport proprietor to impose a perimeter rule designed to allocate long-haul and short-haul traffic among multiple airports. 817 F.2d 222 (2d Cir. 1987), *aff'g* 658 F. Supp. 952 (S.D.N.Y. 1986), *cert. denied*, 485 U.S. 1006 (1988).

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[6] The FAA subsequently issued a contrary opinion on the issues in *Arapahoe*, which is being reviewed by the Court of Appeals for the Tenth Circuit. *Arapahoe County Pub. Airport Auth. v. FAA*, Case No. 99-9508. Oral argument is scheduled for March 2000.

As proprietor of LaGuardia, JFK, and Newark International, the Port Authority established a perimeter rule at LaGuardia prohibiting non-stop flights beyond 1,500 miles. The stated purpose for the rule was "to reduce ground congestion and ***maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark.***" *Western Air Lines, Inc.*, 658 F. Supp. at 953 (emphasis added).

The district court held that the perimeter rule serves "[a] legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor." *Id.* at 958. In words appropriate here, the court wrote:

> Here, as in *City of Houston*, there is in issue a multi-airport system. The effect of the perimeter rule in each case is to divert air traffic from one airport to another within the respective systems, and not to close down metropolitan area runways to all air traffic to or from points outside the perimeter.[7]

*Id.* at 957-58. Affirming the lower court's "well reasoned opinion," the Second Circuit concluded that perimeter rules fall squarely within the proprietary rights exempted in 49 U.S.C. § 41713(b)(3). 817 F.2d at 226.

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[7] In *City of Houston v. FAA*, 679 F.2d 1184, 1188, 1195-96 (5th Cir. 1982), the Fifth Circuit held that the ADA did not prevent the FAA, as proprietor of Washington National and Dulles, from imposing a perimeter rule at National ***to assure full utilization of Dulles and to preserve the short- and medium-haul nature of National.***

For similar reasons, the perimeter rule at Love Field has a reasonable basis: to protect DFW Airport and bond purchasers from the loss of revenue that would be siphoned away by a resurgence of interstate flights at Love Field. Although the Fifth Circuit concluded that the "reallocation of flights between airports [is not] a goal in and of itself," [Pet.App. 37-38], a stated purpose of the restrictions in *Western Air Lines* and *City of Houston* was to allocate short-haul service to one airport and long-haul service to another airport to prevent competition. Likewise, a primary purpose of the ban on passenger service in *Arapahoe County* was to prevent competition between Centennial and Denver International.

As the Colorado Supreme Court observed, local planning is consistent with the ADA, which indicates a willingness to cooperate with and defer to the type of regional aviation planning at issue in this case. *Arapahoe County*, 956 P.2d at 594; *see* 49 U.S.C. § 40101(a)(8); 49 U.S.C. § 47101(g). The ADA provides that it is the goal of Congress to encourage "air transportation at major urban areas through secondary or satellite airports *if* consistent with regional airport plans of regional and local authorities. . . . " 49 U.S.C. § 40101(a)(8) (emphasis added).

DOT's actions in other parts of the nation demonstrate the continuing concern it has for the harm that results when two neighboring airports compete for the same services. By letter dated June 23, 1998, DOT instructed the Central West Virginia Regional Airport Authority that the "new airport for this region would be the only provider of scheduled passenger service, consolidating the current service at Charleston and Huntington." DOT wrote, "The airports at Charleston and

Huntington, in this scheme, would continue to provide general aviation and corporate services." DOT stated that "this assumption was identified as critical to the success of a new airport. . . . "

Similarly, by letter dated May 24, 1999, DOT advised the City of Austin that the FAA would enforce the city's obligation to close Mueller Airport upon the opening of Bergstrom Airport. In familiar words, the Department wrote:

> As you know, the City of Austin agreed to closure of Austin Mueller Airport upon the opening of Bergstrom, as a condition of the FAA's approval of and investment in the new airport. ***That agreement was memorialized in . . . city bond covenants; and in agreements with air carriers serving Austin.***
>
> There were several reasons for this condition. First, ***the two airports are relatively close together, and there is a conflict in the airspace needed for unrestricted operations at both airports***. . . .
>
> Second, ***the commitment to public investment and private financing for the new Bergstrom Airport required that the new airport not be in competition with a nearby facility for airport services and limited resources.***

(Emphasis added).

Finally, the Fifth Circuit apparently did not consider the Wright and Shelby Amendments in its analysis of the ADA. [Pet.App. 39 n.17] However, in the conference report accompanying the Wright Amendment, Congress

expressly stated that the proprietary rights provision of the ADA applies to Love Field:

> The conferees state that the preemption and ***proprietary rights provisions*** of the Federal Aviation Act, sections 105(a) and (b), respectively [now 49 U.S.C. 41713(b)(1),(3)], ***apply to the authority to serve Love Field*** on interstate flights authorized by the amendment.

H.R. CONF. REP. No. 96-716, at 26 (1979) (emphasis added). Accordingly, Dallas's proprietary rights under the ADA are coextensive with every other airport proprietor's in the United States.

Indeed, the purpose of the Wright Amendment was not to mandate flights at Love Field, but to prevent CAB/DOT from certificating flights inconsistent with the cities' agreement. Likewise, the Shelby Amendment merely redefined the "commuter exception" of the Wright Amendment to allow for certification of large aircraft reconfigured to have fifty-six seats or less. Certification of these flights has no preemptive effect. The ADA's proprietary rights provision states, "This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport ***served by an air carrier holding a certificate issued by the Secretary of Transportation*** from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). Congress therefore made clear that airport proprietors may exercise their proprietary rights regardless of whether certificated air carriers serve their airports.

The Fifth Circuit's narrow interpretation of proprietary rights deviates significantly from prior decisions,

from the policies underlying the ADA, and from DOT's practices in other parts of the country. There is an imperative need for the Court to resolve this conflict and construe the ADA as Congress intended, not as DOT has done.

## II.

## THE FIFTH CIRCUIT'S DECISION THAT THE AIRLINE DEREGULATION ACT PREEMPTS SELF-IMPOSED CONTRACTUAL OBLIGATIONS BETWEEN AIRLINES AND AIRPORT OPERATORS CONFLICTS WITH THIS COURT'S DECISION IN *AMERICAN AIRLINES, INC. V. WOLENS.*

The Fifth Circuit's decision that the ADA preempts self-imposed contractual obligations between the DFW Airport Board and many of the airlines serving DFW Airport is at odds with this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S. Ct. 817 (1995). [Pet.App. 43-47] The contracts at issue are "Use Agreements" that some, but not all, airlines serving DFW Airport have executed. In exchange for reduced lease rates and landing fee discounts, the airlines have agreed to use DFW Airport for all their interstate flights in North Texas. Under this Court's holding in *Wolens*, these consensual agreements are not preempted by the ADA.

In *Wolens*, the Court was presented the issue of whether American Airlines' obligations under its frequent flyer program were preempted by the ADA. The Court held that the ADA preempted the plaintiffs' ***tort*** claim for deceptive practices, but did not preempt the breach of ***contract*** claim concerning the frequent flier program. *Id.* at 232-233.

The Court reasoned that if the plaintiffs sought to enforce a contract American entered into voluntarily, that claim should not be regarded as enforcement of state law, but rather as enforcement of American's own "self-imposed undertakings." *Id.* The Court concluded:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings.
>
> * * *
>
> The ADA . . . was designed to promote 'maximum reliance on competitive market forces.' Market efficiency requires effective means to enforce private agreements . . . As stated by the United States: 'The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'

*Id.* at 228-230 (citations omitted). Thus, if a plaintiff seeks to recover for "the airline's alleged breach of its own, self-imposed undertakings," or for the airline's breach of "a term the airline itself stipulated," enforcement of that claim will not constitute enforcement of state law. *Id.* at 228, 232.

The Fifth Circuit interpreted *Wolens* much too narrowly, concluding the Court's reasoning does not apply where one of the parties to the contract is a governmental entity, such as the DFW Airport Board. [Pet.App. 45 n.22] Nothing in *Wolens* suggests the Court would limit its holding to contracts between purely private parties.

In a similar situation, this Court distinguished between regulatory and nonregulatory state activity in the context of the preemption provision of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* In *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 113 S. Ct. 1190 (1993), the Court held that bid specifications, although implemented by the Commonwealth of Massachusetts, were not government "regulations" preempted by the NLRA:

> When we say that the NLRA preempts state law, we mean that the NLRA prevents a State from regulating within a protected zone. . . . A State does not regulate, however, simply by acting within [that protected zone]. ***When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to State regulation.***
>
> Our decisions in this area support the distinction between government as regulator and government as proprietor.

*Id.* at 226-227 (emphasis added).

Fort Worth requests the Court to grant this petition and confirm its holding in *Wolens* that self-imposed contractual obligations are not preempted by the ADA.

## III.

## THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERALISM, NAMELY WHETHER 28 U.S.C. § 1738 OR COMMON LAW RULES OF PRECLUSION PREVENT A FEDERAL ADMINISTRATIVE AGENCY FROM RELITIGATING SPECIFIC LEGAL ISSUES PREVIOUSLY DECIDED BY A STATE COURT.

### A. Whether 28 U.S.C. § 1738 Applies to Federal Administrative Agencies?

Pursuant to 28 U.S.C. § 1738, federal courts must give state court decisions the same preclusive effect they would have in the state of decision. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373, 116 S. Ct. 873, 877 (1996). This rule applies whether the state court judgment is civil or criminal, and whether it construes state or federal law. *Allen v. McCurry*, 449 U.S. 90, 104, 101 S. Ct. 411, 419-420 (1980).

There is a compelling need for this Court to decide an issue of first impression: whether section 1738 also applies to federal administrative agencies, or, instead, whether federal agencies can provide a forum for dissatisfied state court litigants to relitigate issues of federal law. There is presently a disagreement among federal courts as to whether section 1738 should apply to federal agencies. *Compare Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18, 20-21 (1st Cir. 1997) (holding that the policies behind section 1738 apply to federal agencies); *Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993); *Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979); *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), *with NLRB v. Yellow*

*Freight Systems Inc.*, 930 F.2d 316, 320 (3d Cir. 1991) (holding that NLRB was not required to give preclusive effect to a state court judgment).

Prior to the decision below, the most recent opinion on the subject was the First Circuit's in *Bath Iron Works Corporation*. 125 F.3d at 20-21. There, the court opined:

> [R]espect for a prior judgment is mandated by the full faith and credit clause, U.S. Const. art. IV, § 1, or its statutory counterpart, 28 U.S.C. § 1738. A literal reader might doubt that either has much to do with the present case, because . . . the former constrains states, not federal entities, and the latter is directed explicitly to federal courts and says nothing about federal agencies. But the policy arguments for similar treatment-especially avoidance of duplicative litigation-tend to be the same.

*Id.* Before that, in *Deerfield*, the Second Circuit held that the FCC could not disregard the ruling of a federal court, even though the federal court had simply complied with section 1738 and given preclusive effect to a state court ruling on federal issues. 992 F.2d at 428.

The Fifth Circuit erred when it summarily concluded that Section 1738 did not obligate DOT to accord full faith and credit to the state court's judgment.[8] [Pet.App. 17-19] The court did not mention, much less distinguish, the circuit court decisions in *Deerfield* or *Bath Iron Works*. As for the opinions in *Midgett* and *Torres*, the Fifth Circuit

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[8] Under Texas law, the state court's judgment is entitled to preclusive effect even while on appeal. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

said it could not conclude with certainty that those courts relied on section 1738. [Pet.App. 17 n.6] In *Midgett*, however, the court expressly stated, "Section 1738 of 28 U.S.C. imposes on a federal court presented with a state court judgment the same force and conclusive effect as it has in the state in which it is rendered. Administrative bodies of the United States as well as courts are required to adhere to this requirement." 603 F.2d at 845.

Equally problematic is the Fifth Circuit's conclusion that section 1738 is inapplicable to federal agencies because it only refers to "courts". [Pet.App. 17] That fact is of little significance since section 1738 antedates the development of administrative agencies. In a similar context, this Court recognized that agency findings of one state could bind another state's agency under the full faith and credit clause, even though that provision speaks only in terms of "judicial" proceedings. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 281, 100 S. Ct. 2647, 2661 (1980).

### B. Whether the Department of Transportation Was Bound by Common Law Rules of Preclusion?

Alternatively, this Court should decide whether DOT was bound by federal common-law rules of preclusion to honor the prior state court judgment. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794, 106 S. Ct. 3220, 3224 (1986) ("[W]e have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute."). The Fifth Circuit recognized that such rules apply to agencies, but concluded that considerations of repose and federalism were outweighed by the interest in

having DOT interpret federal aviation law. [Pet.App. 19-22]

The flaw in the Fifth Circuit's reasoning is that DOT could have offered its interpretation of federal law in many ways less intrusive than commencing its own proceeding one year after the state court action. It could, for example, have instituted its proceeding as soon as it learned of the state court action in October 1997. [Pet.App. 16 n.5] It could have intervened in the state court action, or submitted an *amicus curiae* brief to the state trial or appellate courts.[9] [Pet.App. 16 n.5] Finally, DOT could have offered its views to this Court when the issues surrounding Love Field reached final review from the state court system, as it did in *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-229, 115 S. Ct. 817, 824 (1995) (considering DOT's *amicus curiae* brief on the ADA).

Consequently, DOT did not have to instigate this unseemly conflict between the state and federal court systems. In the past, this Court has acknowledged that rules of preclusion are fundamental to maintaining comity between the state and federal systems. *Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S. Ct. 411, 415 (1980) ("[R]es judicata and collateral estoppel not only reduce unnecessary litigation . . . but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."). For these reasons, Fort Worth requests the Court to grant this petition and

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[9] As the Fifth Circuit noted, "presumably, if the federal interests were that important, DOT would have taken one of these actions." [Pet.App. 22 n.8]

reconfirm the right of state courts to decide federal law issues.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

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No. 99-60008

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AMERICAN AIRLINES, INCORPORATED; CITY OF DALLAS, TEXAS; SOUTHWEST AIRLINES COMPANY; LOVE FIELD CITIZENS ACTION COMMITTEE,

Petitioners,

versus

DEPARTMENT OF TRANSPORTATION,

Respondent.

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No. 99-60239

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THE CITY OF FORT WORTH; DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD,

Petitioners,

versus

DEPARTMENT OF TRANSPORTATION,

Respondent.

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Petitions for Review of an Order of the
U.S. Department of Transportation

(Filed Febr. 1, 2000)

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Before DUHÉ, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This consolidated appeal involves respondent Department of Transportation's ("DOT's") interpretation of federal law governing airline service at Love Field airport. Petitioners Dallas-Fort Worth International Airport Board ("DFW Board"), City of Fort Worth ("Fort Worth"), American Airlines, Inc. ("American"), City of Dallas ("Dallas"), Southwest Airlines Company ("Southwest"), and Love Field Citizens Action Committee (the "Committee") petition for review of DOT's declaratory, procedural, and reconsideration orders. Legend Airlines, Inc. ("Legend"), Continental Airlines, Inc. ("Continental") and Continental Express, Inc. ("Continental Express") have intervened. For the reasons set forth below, we affirm.

I

Prior to 1968, Dallas and Fort Worth operated independent and competing airports. One of Dallas's airports was Love Field. DOT's predecessor agency, the Civil Aeronautics Board ("CAB"), found that the competition between Dallas's and Fort Worth's airports was harmful. Accordingly, in 1964 CAB ordered the cities to build a jointly-operated airport that would serve as the region's primary airport. The cities responded by creating the DFW Board and by jointly adopting the 1968 Regional Airport Concurrent Bond Ordinance (the "Ordinance"). The Ordinance authorized the issuance of bonds to finance the Dallas-Fort Worth Airport ("DFW"). Of critical importance here is section 9.5 of the Ordinance, which contained the cities' agreement to "take such steps as

may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the [DFW] Regional Airport."

The eight CAB-certified air carriers who were using the Dallas and Fort Worth airports first signed "letter agreements" and then later signed "use agreements" with the DFW Board, agreeing to move their air services to DFW as specified in the Ordinance. Southwest, which was solely running intrastate flights from Love Field and thus was exempt from CAB certification and pressure, refused to move to DFW and did not sign a use agreement. Litigation ensued over efforts to force Southwest from Love Field, terminating with our statement that "Southwest Airlines Co. has a federally declared right to the continued use of and access to Love Field, so long as Love Field remains open." *Southwest Airlines Co. v. Texas Int'l Airlines, Inc.*, 546 F.2d 84, 103 (5th Cir. 1977).

Congress deregulated the airline industry in 1978. Shortly thereafter, Southwest applied for permission to provide interstate service between Love Field and New Orleans. CAB granted the application, concluding that it lacked power to deny it. This prompted Congress to intervene by enacting the Wright Amendment. *See* Pub.L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980). The Wright Amendment generally bans interstate service from Love

Field.[1] However, it provides certain exemptions from this ban, two of which are significant here: (1) the commuter

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[1] In its entirety, the Wright Amendment states:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979 may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service

airline exemption allows interstate "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less"; and (2) the contiguous state exemption allows flights to and from Louisiana, Arkansas, Oklahoma, and New Mexico, if the flights do not "provide any through service or ticketing with another air carrier" and do not "offer for sale transportation to or from . . . any point which is outside any such State." *Id.*

In 1996, Dalfort Aviation, the parent corporation of Legend, announced plans to take advantage of the commuter airline exemption by reconfiguring large commuter planes to hold only 56 seats. In response, the DOT General Counsel issued an opinion holding that the exemption applied only to aircraft originally configured to seat less than 57 passengers. The DOT opinion was mooted by the 1997 passage of the "Shelby Amendment" (collectively with the Wright Amendment, the "Love Field amendments"). The Shelby Amendment defined the term

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or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This section shall not take effect if enacted after the enactment of the Aviation Safety and Noise Abatement Act of 1979.

*Id.*

"passenger capacity of 56 passengers or less" in the commuter airline exemption to "include[ ] any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56." *See* Pub.L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).[2] The Shelby

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[2] The Shelby Amendment provides in its entirety that:

> (a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".
>
> (c) SAFETY ASSURANCE. – The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

*Id.*

Amendment also expanded the contiguous states exemption to allow direct flights between Love Field and airports within Kansas, Alabama, and Mississippi. *See id.*

The parties in this case responded in various ways to the Shelby Amendment. Southwest began offering flights between Love Field and Mississippi and Alabama. Legend has announced plans to offer longhaul service to states outside the Love Field service area using large aircraft reconfigured to have less than 57 seats. Continental Express plans to use regional jets with less than 57 seats to fly between Love Field and Cleveland. Continental Express and American offer intrastate flights from Love Field to their hubs, in Houston and Austin respectively.

In response, Fort Worth sued Dallas, the DFW Board, Legend, Continental, and Continental Express in Texas state court to block the proposed additional service from Love Field. The state court found that the Ordinance was not preempted by federal law and that Dallas was obligated by the Ordinance to preclude airlines from flying between Love Field and areas outside Texas and the four-state service area authorized by the Wright Amendment. The state action is currently on appeal, although the state appellate court has stayed the appeal pending our resolution of this case.

While the state court action was pending, Dallas filed a federal suit against DOT and Fort Worth requesting declaratory relief on essentially the same issues involved in the state action. The federal court has stayed that proceeding pending resolution of the instant case.

At the urging of several of the parties, and while both the federal and state actions were pending, DOT initiated the interpretative proceeding that is the subject of this petition for review. DOT issued an order informing the parties in this action[3] that it intended to rule on four "federal law issues" and allowing the parties an opportunity to submit comments on these issues. Subsequently, in response to the parties' initial comments, DOT issued a procedural order which, *inter alia*, granted the DFW Board's request to resolve a fifth legal issue and granted several parties' request for an extension of time in which to file comments.

DOT ultimately issued a "Declaratory Order" resolving the five questions it had set forth. Specifically, DOT ruled that:

> (i) the City of Fort Worth may not enforce any commitment by the City of Dallas . . . to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such

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[3] Notice of this order was not sent to the Committee. The Committee subsequently learned of the proceeding and DOT granted its request for an extension of time to file comments.

> service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment. . . .

Declaratory Order at 58. In an accompanying "Procedural Order," DOT rejected various procedural objections raised by the parties. DOT subsequently reaffirmed its rulings on reconsideration.

## II

We have jurisdiction to review DOT's declaratory order by this petition for review. *See* 49 U.S.C. § 46110(e) ("[A] person disclosing a substantial interest in an order issued by the Secretary of Transportation . . . may apply for review of the order by filing a petition for review in the . . . court of appeals of the United States for the circuit in which the person resides or has its principal place of business."). The standard of review we apply differs according to the specific action DOT took. Our review of DOT's interpretation of the statutes it is charged with administering is governed by the two-step standard of review established in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed.2d 694 (1984). We first determine whether

Congress directly spoke to the precise question in issue. If the intent of Congress is clear, then we, and the agency, must give effect to the unambiguously expressed intent of Congress. *See id.* at 842-43, 104 S. Ct. at 2781, 81 L. Ed. 2d at ___. If Congress has not directly addressed the precise question in issue, we ask whether the agency's interpretation was "based on a permissible construction of the statute." *Id.* at 843, 104 S. Ct. at 2782, 81 L. Ed. 2d at ___. As long as the agency's construction of an ambiguous statute is permissible, it must be upheld. *See id.*; *Texas Oil & Gas Assoc. v. EPA*, 161 F.3d 923, 937-38 (5th Cir. 1998).

However, we only engage in the *Chevron* analysis when reviewing an agency's interpretation of a statute it was charged with administering. When reviewing DOT's interpretation of a statute it is not charged with administering, we do not grant DOT *Chevron* deference. *See American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998) ("We do not, however, accord *Chevron* deference to EPA's interpretation of the ESA, because the ESA is not a statute that EPA is charged with administering.").

## III

Several of the parties challenge DOT's declaratory order on procedural grounds. They argue that: (a) DOT violated the Administrative Procedure Act ("APA"), (b) its order improperly contravened the earlier state court ruling on the same issues, and (c) DOT failed to comply with environmental requirements before issuing its order.

## A

Fort Worth and the DFW Board argue that DOT's ruling violated the APA in various ways. *See* 5 U.S.C. § 706 (directing a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law"). Although DOT has already rejected some of these challenges in its earlier rulings, we review *de novo* DOT's interpretation and application of the APA. *See Professional Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991) ("The Supreme Court has indicated, however, that reviewing courts do not owe the same deference to an agency's interpretation of statutes that, like the APA, are outside the agency's particular expertise and special charge to administer.").

### 1

Several parties contend that DOT failed to provide them with sufficient notice as required under § 554(b) or, alternatively, § 553, of the APA. We exercise plenary review over whether DOT complied with applicable procedures. *See Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 198 (5th Cir. 1989).

DOT issued its declaratory order after conducting an informal adjudication, pursuant to its authority under § 554(e) to "issue a declaratory ruling to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e); *see also Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) ("The ICC's declaratory order was issued after an informal adjudication pursuant to the authority conferred by 5 U.S.C. § 554(e) to 'issue a declaratory ruling to

terminate a controversy or remove uncertainty.' Rendered in a specific factual context and resolving only the questions presented by [the petitions], it 'belongs to the genre of adjudicatory rulings.' ") (citations omitted). Several parties object to DOT's failure to adhere to the APA's notice requirements for formal adjudications. However, in the absence of a statute requiring an agency to conduct its adjudication "on the record after opportunity for agency hearing," 5 U.S.C. § 554(a), an agency can define its own procedures for conducting an informal adjudication. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655-56, 110 S. Ct. 2658, 2680-81, 110 L. Ed. 2d 563, ___ (1990).

While the APA does not expressly require notice in informal adjudications, courts have inferred a requirement that there be "some sort of procedures for notice [and] comment . . . as a necessary means of carrying out our responsibility for a thorough and searching review [of agency action]." *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982). Here, DOT issued an order in which it specified the legal issues on which it would rule, allowed the parties to submit comments on these issues, and extended the comment period at the request of several parties. It then ruled on precisely the issues that it identified. We find that DOT's actions satisfied the minimum procedural notice requirements. *See id.*

Fort Worth contends that DOT failed to comply with § 554(b) by neglecting to notify parties that DOT would also be considering a factual issue: the effect of increased service at Love Field on DFW Airport. This argument fails for two reasons. First, as noted, the formal notice

requirement of § 554(b) does not apply to an informal adjudication. Second, the parties were effectively on notice of this issue since it was one that they could reasonably expect to arise given the issues of which DOT gave notice. *Cf. Boston Carrier Inc. v. Interstate Commerce Comm'n*, 746 F.2d 1555, 1559 (D.C. Cir. 1984) ("The Commission is not burdened with the obligation to give every applicant a complete bill of particulars as to every allegation that carrier will confront."). The fact that Dallas, Continental Express, and Legend all submitted factual evidence to DOT should also have put Fort Worth on notice that it could submit its own factual evidence.

We also note the absence of anything in the record to indicate that Fort Worth possesses any information bearing on the impact of increased service at Love Field. Fort Worth has had three opportunities to present or identify such evidence – during the comment period, in its motion for reconsideration, and in its brief on appeal – but has not demonstrated that it possesses relevant factual information not considered by DOT. This continued failure to identify the evidence it would have submitted indicates that Fort Worth was not prejudiced by any inadequacy in DOT's notice. *See* 5 U.S.C. § 706 (in reviewing an agency determination, "due account shall be taken of the rule of prejudicial error"); *Friends of Iwo Jima v. Nat'l Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999) ("Moreover, the party who claims deficient notice bears the burden of proving that any such deficiency was prejudicial.").

We also reject the DFW Board's argument that DOT's order amounts to a substantive rule subject to the notice

and comment provision of § 553. Agencies have discretion to choose between adjudication and rulemaking as a means of setting policy. *See NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294, 94 S. Ct. 1757, 1771, 40 L. Ed.2d 134, ___ (1974); *Mobil Exploration and Producing North America, Inc. v. FERC*, 881 F.2d 193, 198 (5th Cir. 1989) (citing Bell Aerospace). In determining whether an agency action constituted adjudication or rulemaking, we look to the product of the agency action. We also accord significant deference to an agency's characterization of its own action. *See British Caledonian Airways, Ltd. v. Civil Aeronautics Bd.*, 584 F.2d 982, 992 (D.C. Cir. 1977) ("In the present case we have, moreover, the Board's own assertion that its order is purely interpretive, and this contention in itself is entitled to a significant degree of credence. . . . While declaratory orders differ in some respects from interpretive rules, the same rationale should apply equally to an agency's characterization of one of its rulings as a declaratory order."). Since the APA defines "adjudication" as the "agency process for formulating an order," 5 U.S.C. § 551(7), and DOT classifies its ruling as a declaratory order, we find that the agency engaged in adjudication rather than rulemaking. Furthermore, because DOT's order interpreted the rights of a small number of parties properly before it, DOT did not abuse its discretion by acting through an adjudicatory proceeding. *See British Caledonian Airways*, 584 F.2d at 992-94; *Mobil Exploration*, 881 F.2d at 199 (finding no abuse of discretion where, *inter alia*, an agency proceeded by adjudication to resolve an issue affecting a small number of parties).

Fort Worth, joined by American, also argues that it was deprived of its right to a fair agency determination because of *ex parte* contacts between Continental Express, Legend, and DOT. Fort Worth cites specific instances when Continental Express and Legend officials contacted DOT about the pending state and federal court actions and asked DOT to intervene in these actions. The officials suggested specific actions which DOT could take and strongly advocated for DOT's intervention, including by characterizing the state court proceedings in unfavorable terms. DOT responded at one point with a written letter answering four questions posed by Continental. DOT and Legend do not dispute that the contacts took place, but they both argue that the contacts were proper and did not bias DOT's final decision.

DOT regulations prohibit certain *ex parte* contacts between agency personnel and interested parties.[4] *See* 14 C.F.R. § 300.2(a). Most of the contacts here fall outside these regulations because they occurred before DOT instituted its interpretation proceeding. *See* 14 C.F.R. § 300.2(a) ("[T]here shall be no substantive communication in either direction between any concerned DOT employee and any interested person outside DOT, concerning a *public proceeding*, until after final disposition of

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[4] Fort Worth also relies on the APA ban on *ex parte* communications, but this ban does not apply here, because it does not cover informal adjudications. *See* 5 U.S.C. § 557(a), (d) (stating that the prohibition on *ex parte* contacts applies "when a hearing is required to be conducted in accordance with section 556 "); *id.* § 556 (governing formal hearings).

the proceeding.") (emphasis added); *id.* § 300.2(b)(4)(v) (defining a public proceeding as a "proceeding initiated by a docket filing, other than a petition for generally applicable rulemaking, *after the filing in the docket of an identifiable written opposition to the initiating document*") (emphasis added). Additionally, most of the contacts, including those which occurred after DOT initiated its proceeding, did not involve the merits of the proceedings but rather were permissible requests to intervene in the state and federal action. *See Texas*, 866 F.2d at 1550 (finding that an individual's request for the Interstate Commerce Commission to intervene in a pending state action was not an *ex parte* communication because it did not involve the merits of the case).

**B**

The posture of the case presents more serious procedural concerns. DOT and the state court issued contrary rulings on some of the same issues in proceedings involving some of the same parties.[5]

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[5] Although the state and DOT proceedings overlapped, neither tribunal made significant efforts to accommodate the views of the other. The state court essentially gave DOT one month to issue its declaratory order and when DOT failed to do this, the state court ruled without the benefit of DOT's views. DOT, on the other hand, did not issue its declaratory order within the time set by the state court, did not attempt to intervene in the state court action even though some of the parties there asked it to intervene, and did not ask the state court to stay its ruling until DOT ruled on the same issues. Instead, DOT rejected the state court's view in its order, noting only the state court's lack of reasoning in support of its position.

Consequently, Fort Worth, the DFW Board, and American (collectively "Fort Worth petitioners") ask us to reverse DOT's action because (1) DOT violated the full faith and credit statute, 28 U.S.C. § 1738, by not granting preclusive effect to the prior state court ruling, and (2) DOT violated the Anti-Injunction Act and corresponding common law principles of federalism by issuing a declaratory order affecting a case currently pending before a state court. DOT rejected these arguments in its earlier rulings, but we do not defer to DOT's ruling on these issues. *See American Forest and Paper Ass'n*, 137 F.3d at 297.

1

The full faith and credit statute, 28 U.S.C. § 1738, generally requires federal courts to grant preclusive effect to state court judgments: "[t]he records and judicial proceedings of any court of any . . . State . . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." *Id.* The plain language of this section establishes that it does not apply here: § 1738 applies only to "every *court* within the United States," and DOT is an agency, not a "court." *Id.* (emphasis added). The only other circuit to address fully this issue agrees with this reading of § 1738.[6] *See NLRB v.*

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[6] The Fort Worth petitioners rely on two district court cases which have arguably held to the contrary. In *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), the court stated in passing that "[t]he Administrative agencies of the United States are no less bound that he [sic ] courts of the United States to give full faith and credit to the decisions of the Courts of Puerto Rico." *Id.* at 4.

*Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3d Cir. 1991) (finding that the NLRB, by virtue of its status as an agency rather than a court, was not required to give full faith and credit to an earlier state court judgment); *cf. Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 n.5 (D.C. Cir. 1986) ("We agree with the FERC, though, that

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The court did not cite § 1738, and thus it might have relied instead on the common law preclusion doctrines we discuss below. In *Midgett v. United States*, 603 F.2d 835 (Ct. Cl. 1979), the court cited *Torres* and stated: "Section 1738 of 28 U.S.C. imposes on a federal court presented with a state court judgment the same force and conclusive effect as it has in the state in which it is rendered. Administrative bodies of the United States as well as courts are required to adhere to this requirement." *Id.* at 845 (citation omitted). The court did not clearly indicate that it based its holding on § 1738, as opposed to merely analogizing to § 1738.

We cannot conclude with certainty whether these cases relied on § 1738. To the extent they did, we believe the better rule, for the reasons stated above and herein, is that § 1738 does not apply to agencies, but the rationale underlying § 1738 extends to agencies through common law preclusion doctrines. This rule is consonant with Supreme Court precedent and the plain text of § 1738, and it accounts for the concerns raised by the *Midgett* and *Torres* courts.

Fort Worth also argues that *United States v. ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) addresses the question presented here. In *ITT Rayonier*, the Ninth Circuit held that the Environmental Protection Agency ("EPA") was bound by res judicata from pursuing an enforcement action when a prior enforcement action had been litigated in state court. *See id.* at 999-1004. The Ninth Circuit applied res judicata because it found that the EPA was in privity with the parallel state agency which had pursued the state enforcement action. *See id.* at 1002-04. *ITT Rayonier* is distinguishable from the present case, because Fort Worth has made no showing that DOT was in privity with any party in the state court action.

'[t]he fact that the state court ruled on the same issue, regardless whether its ruling agreed with the Commission's ruling, does not affect the Commission's authority to determine its own jurisdiction.' ").

The Supreme Court adopted this plain reading of § 1738 when presented with the question of whether a federal court must accord full faith and credit to an unreviewed state agency proceeding. *See University of Tennessee v. Elliott*, 478 U.S. 788, 794, 106 S. Ct. 3220, 3224, 92 L. Ed. 2d 635, ___ (1986). Reading § 1738's references to "courts" as not including "agencies," the *Elliott* court concluded simply that " § 1738 governs the preclusive effect to be given the judgments and records of state courts, and is not applicable to the unreviewed state administrative factfinding at issue in this case." *Id.* at 794, 106 S. Ct. at 3224, 92 L. Ed. 2d at ___.

Finding that § 1738 does not apply to agencies does not end our inquiry, however, as courts "have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." *Id.* at 794, 106 S. Ct. at 3224, 92 L. Ed. 2d at ___. The Supreme Court fashioned such a rule in *Elliott*, requiring federal courts to grant preclusive effect to findings of fact by state agencies in most subsequent federal actions. *See id.* at 796-99, 106 S. Ct. at 3224-26, 92 L. Ed. 2d at ___ (holding also that no preclusive effect should be given to state administrative agency factfinding in Title VII cases). To determine whether common law preclusion should apply here, we consider whether the policies favoring full faith and credit, including repose and federalism concerns, *see generally Allen v. McCurry*, 449 U.S. 90, 95-96, 101 S. Ct. 411, 415, 66 L. Ed. 2d 308, ___ (1980) ("[R]es judicata and

collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system."), outweigh the federal interests present here, *see Midgett*, 603 F.2d at 845 ("A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court."); *cf. Yellow Freight*, 930 F.2d at 320 (discussing policy reasons why an agency should not be bound by § 1738). *See generally American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972) (suggesting, in *dicta*, that § 1738 can be trumped by "well-defined [competing] federal policies"); 18 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 4469, at 662-63 (1981) ("In various settings, federal courts have found that vital federal interests warrant rejection of the res judicata rules that state courts would apply to their own judgments.").

Applied here, the competing policy considerations weigh against requiring DOT to grant preclusive effect to the state court proceeding.[7] *Cf. Yellow Freight*, 930 F.2d at

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[7] Because we resolve the matter on these grounds, we do not reach DOT's alternative argument that the state court judgment should not be granted preclusive effect because a Texas court would not grant the judgment preclusive effect. *See generally Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 374, 116 S. Ct. 873, 878, 134 L. Ed. 2d 6, ___ (1996) ("When faced with a state court judgment relating to an exclusively federal claim, a federal court must first look to the law of the rendering State to ascertain the effect of the judgment.").

320-22 (holding that the NLRB was not bound by an earlier arbitrator's factfinding, even though the arbitrator's ruling was affirmed by a state court, because essential evidence was not presented to the arbitrator). First, the importance of repose here, while not insubstantial, is limited by the posture of this case. At the time the state court issued its ruling, parallel agency proceedings were already underway.

Second, this case involves aviation regulation, an area where federal concerns are preeminent and where DOT is charged with representing those concerns. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (1994) ("The Secretary of Transportation is charged with administering the federal aviation laws. . . . "); *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303, 64 S. Ct. 950, 956, 88 L. Ed. 1283, ___ (1944) (Jackson, J., concurring) ("Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive."), *quoted in City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34, 93 S. Ct. 1854, 1860, 36 L. Ed.2d 547, ___ (1973); 849 U.S.C. § 46101(a)(2) (granting the Secretary of Transportation discretion to "conduct an investigation . . . about . . . any question that may arise under this part"). Additionally, this case involves the operation of flights from Love Field, a matter on which Congress has twice specifically legislated. DOT's interpretive order is the first time that DOT, the agency specifically charged with administering the Wright Amendment, has interpreted the Shelby Amendment. *See Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991) (noting that "[t]he individual defendants

in their official capacity, DOT, and DOT's Office of Aviation Analysis enforce the [Wright] amendment"); *State of Kansas v. United States*, 16 F.3d 436, 438 (D.C. Cir. 1994) (same). To allow the state court effectively to foreclose the administering agency from further consideration of the Shelby Amendment as to the parties which appeared before the state court would trump the key federal interests that motivated Congress to create DOT and give it authority over these laws.[8]

Finally, applying full faith and credit principles to DOT in this case would lead to inconsistent results. *Cf. Access Telecommunications v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998) (noting that the primary jurisdiction doctrine, under which courts refer matters to agencies when the matters are within agency jurisdiction, is motivated in part by the desire "to promote uniformity and consistency within the particular field of regulation"). Some of the parties before DOT are litigating these issues for the first time. Forcing DOT to grant preclusive effect to the state court ruling would lead to inconsistent application of the Shelby Amendment to the parties that did not appear before the state court.

In sum, because of the important federal interests here, we decline to hold that common law preclusion

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[8] These key federal interests are arguably lessened by the fact that DOT did not attempt to stay or intervene in the state court action; presumably if the federal interests were that important, DOT would have taken one of these actions. DOT's inaction is partially justified by the limited amount of time it had to intervene, as the state court only stayed the proceedings before it for one month.

doctrines apply in this case. Instead, DOT properly declined to give preclusive effect to the state court judgment.[9]

2

The Fort Worth Petitioners also argue that DOT's actions violated the Anti-Injunction Act, 28 U.S.C. § 2283, which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress,

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[9] We reject the Fort Worth petitioners' invocation of the so-called *Rooker-Feldman* doctrine for the same reasons. "In a nutshell, the doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments." *Matter of Reitnauer*, 152 F.3d 341, 343 (5th Cir. 1998) (applying the doctrine where "[t]he district court . . . made apparent its displeasure with the manner in which the state court interpreted and applied state law [and] such displeasure formed the basis for its reversal of the bankruptcy court's order."). As we have previously noted, the *Rooker-Feldman* doctrine is "very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment." *Gauthier v. Continental Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987). Thus, we have not applied the *Rooker-Feldman* jurisdictional bar in cases where we have found it inappropriate to require a federal court to give full faith and credit to a state court judgment. *See id.* (not applying the *Rooker-Feldman* doctrine where full faith and credit does not apply because the state court judgment would not be entitled to preclusive effect under state law). We follow this practice here. The Fort Worth petitioners have not cited any cases where the *Rooker-Feldman* doctrine has been applied to an agency ruling on matters of federal law previously addressed by a state court. In light of the above-noted concerns, we see no reason to extend the doctrine to this context.

or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. We "follow the weight of authority in holding that [i]f an injunction would be barred by § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction." *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) (*en banc*) (quotation omitted) (alteration in original); *see also Travelers Ins. Co. v. Louisiana Farm Bureau Fed'n, Inc.*, 996 F.2d 774, 776 (5th Cir. 1993) ("[T]he district court may not consider the merits of the declaratory judgment action when 1) a declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff, 2) the state case involves the same issues as those involved in the federal case, *and* 3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act.") (emphasis in original).

As a federal agency, DOT's proceedings are exempt from the terms of § 2283, which applies only to proceedings in a "court of the United States." 28 U.S.C. § 2283; *see also id.* § 451 ("As used in this title [,][t]he term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior."). Further, even where an action is ongoing in a "court of the United States," an agency's presence as a party, together with the federal interest the agency represents, can trump the application of § 2283. *See Mitchum v. Foster*, 407 U.S. 225, 235-36, 92 S. Ct. 2151, 2158-59, 32 L. Ed. 2d 705, ___ (1972) ("[A] third exception

[to § 2283], more recently developed permits a federal injunction of state court proceedings when the plaintiff in the federal court is the United States itself, or a federal agency asserting 'superior federal interests.' "); *Texas v. United States*, 837 F.2d 184, 186 (5th Cir. 1988) ("Moreover, because a federal agency seeks the injunction, the ICC's motion is not directly precluded by the strictly enforced rule of the Anti-Injunction Act, 28 U.S.C. § 2283."); *United States v. Lemaire*, 826 F.2d 387, 388 n.2 (5th Cir. 1987) ("The Act does not prevent the United States, or one of its agencies, from acting to protect a federal interest."). Thus, § 2283 does not restrict our ability to review the agency's decision.

Fort Worth's authority to the contrary is unavailing. The case before us is clearly distinguishable from *United Credit Bureau of America, Inc. v. NLRB*, 454 U.S. 994, 102 S. Ct. 539, 70 L. Ed. 2d 404 (1981) (Rehnquist, J., dissenting from denial of certiorari), where then-Justice Rehnquist dissented from the denial of certiorari to argue that "the concerns of federalism and comity comprehended by the Anti-Injunction Act should . . . apply to the NLRB." *Id.* at 997-98, 102 S. Ct. at 541, 70 L. Ed. 2d at ___.[10] In *United Credit*, the NLRB ordered a party to dismiss a state court action. It did this without "consider[ing] whether the state-court proceeding interfered with its ability to consider or dispose of [the agency petitioner's] charges." *United Credit*, 454 U.S. at 998, 102 S. Ct. at 541, 70 L. Ed. 2d at ___ (noting that the state court had not yet acted).

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[10] We note in passing that, as a denial of a petition for certiorari, the *United Credit Bureau* opinion is not binding authority. *See Teague v. Lane*, 489 U.S. 288, 296 (1989).

Here, the state court action, at least at the trial level, was completed, thus lessening DOT's intrusion and strengthening its reasons for issuing its own interpretation of the legal issues. Also, DOT's interest here is not its interest in resolving an individual petitioner's claim, as in *United Credit*, but rather its interest in avoiding piecemeal application of a federal aviation statute.

Additionally, we do not believe that DOT violated general principles of federalism by issuing its ruling. Although the Fort Worth Petitioners correctly note that state courts are competent to resolve matters of federal law, this does not prevent federal agencies from acting within their authority to protect federal interests. Accordingly, the cases that the Fort Worth Petitioners cite in support of their federalism arguments are clearly distinguishable. *See, e.g., Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 339 (5th Cir. 1999) (holding that a district court properly remanded a state law claim after dismissing federal claims, even though one of the state law claims involved a preemption defense, because "state courts, being of equal dignity with federal courts, are equally competent to address that potential defense").

C

As a final procedural objection, the Committee argues that DOT improperly ruled without first preparing an environmental impact statement ("EIS"). The National Environmental Policy Act ("NEPA") directs "all agencies of the Federal Government . . . [to] include [an EIS] in

every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2). DOT found that it did not need to prepare an EIS, but because it is not charged with administering NEPA, its decision to not prepare an EIS is not entitled to deference. *See American Forest and Paper Ass'n*, 137 F.3d at 297.

The Committee argues that DOT's "decision" to allow increased flights constitutes a "major Federal action" under NEPA. We disagree. Agency decisions which "do not entail the exercise of significant discretion" do not require an EIS. *Atlanta Coalition on Transp. Crisis, Inc. v. Atlanta Regional Comm'n*, 599 F.2d 1333, 1344-45 (5th Cir. 1979). By enacting the Shelby Amendment, Congress, not DOT, made the decision to allow additional flights at Love Field. DOT merely issued an interpretation of federal law that it was required to adopt under the relevant statutes.[11] *See Sugarloaf Citizens Ass'n*

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[11] For example, 49 U.S.C. § 41713, which DOT interpreted here, does not grant DOT discretion because Congress has defined the extent of federal preemption and has specified which state rights remain. On the other hand, when DOT applies § 41714(c), governing the award of slots to new entrants, DOT is clearly granted discretion by the statute. *See* 49 U.S.C. § 41714(c) ("If the Secretary *finds it to be in the public interest and the circumstances to be exceptional*, the Secretary *may* by order grant exemptions from the requirements under subparts K and S of part 93 of title 14, Code of Federal Regulations, to enable new entrant air carriers to provide air transportation at high density airports.") (parentheticals omitted and emphasis added). Thus, when applying § 41714, DOT follows NEPA. *See, e.g., Applications of Trans States Airlines, Inc.*, DOT Order 98-4-21,

*v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992) ("Other Circuits have held that when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA."); *Goos v. ICC*, 911 F.2d 1283, 1296 (8th Cir. 1990) ("Because the ICC has not been granted any discretion under section 1247(d) to base its issuance of an NITU or CITU on environmental consequences, we agree that it would make little sense to force the ICC to consider factors which cannot affect its decision. . . . "); *Milo Community Hospital v. Weinberger*, 525 F.2d 144, 147 (1st Cir. 1975) (finding that no EIS was necessary where "consideration of the factors that the appellant has characterized as 'environmental considerations' could not have changed the Secretary's decision.").[12]

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1998 DOT Av. LEXIS 159, at *54-*55 (1998) (conducting an environmental assessment in a § 41714 determination).

[12] The Committee also argues that DOT failed to follow its own environmental procedures. The Committee relies on an FAA statement of "Polices [sic] and Procedures on Considering Environmental Impacts" which, as DOT notes, is inapplicable here because it "establishes Federal Aviation Administration (FAA) policies and procedures." DOT was not acting under the auspices of the FAA in this case. Instead, DOT asserts that the relevant DOT guidelines still require major agency action before undertaking an EIS, and we agree. *See* 44 Fed. Reg. 56420, 56424 (1979) ("An EIS shall be prepared for any proposed major Federal action significantly affecting the environment."); *see also id.* (requiring an environmental assessment when "a decision has not been make [*sic*] to prepare an EIS," but noting that the environmental assessment describes "the environmental impacts of a proposed action"). The Committee does not cite any contrary authority in its reply brief.

## IV

The Declaratory Order stated that DOT intended to rule on four "federal law issues." DOT's subsequent Procedural Order added a fifth legal issue to the agency's docket. We review each of DOT's rulings in turn.

### A

We first turn to DOT's ruling that the preemption provision of the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), preempted Dallas's and Fort Worth's obligations under the Ordinance. In reaching this decision, DOT also determined that Dallas's rights as the proprietor of Love Field did not permit it to bar airlines from operating the services authorized under the Shelby Amendment. On appeal, the Fort Worth Petitioners argue that the power to restrict services at Love Field falls within Dallas's rights as proprietor of the airport. Thus, they argue, Dallas has an existing contractual obligation to restrict service at Love Field so as to block airlines from operating the services permitted under the Shelby Amendment.

#### 1

The ADA includes an express preemption provision, § 41713(b)(1), which generally prohibits states from enacting or enforcing a law or regulation "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). At the same time, the ADA reserves the state's authority to carry out its "proprietary powers and rights." 49 U.S.C.

§ 41713(b)(3) (hereinafter, the "proprietary powers exception").

The proper standard of review to apply to DOT's preemption determination is the subject of extensive debate and briefing among the parties. It is also an issue of first impression before us. The Fort Worth Petitioners contend that DOT's interpretation of the proprietary powers exemption should be afforded no deference because DOT lacks both the authority and the expertise to interpret this section of the ADA. DOT, Dallas, and Continental Express argue that DOT's general authority to administer the ADA inherently includes the power to administer the statute's preemption provision. Consequently, they argue for deferential review of DOT's preemption determination under *Chevron*.

The Fort Worth Petitioners present several strong arguments in favor of *de novo* review. A preemption determination does indeed involve legal determinations, which are arguably more within the expertise of the courts. *See Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571 (10th Cir. 1991) (adopting a *de novo* standard of review because "[a] preemption determination involves matters of law-an area more within the expertise of courts than within the expertise of the Secretary of Transportation."). In reaching its decision, DOT interpreted existing case law, a role more typically – and perhaps more appropriately – left to the courts. Beyond this, the task of defining what constitutes a "proprietary power" has traditionally been left to the courts. *See, e.g., National Helicopter Corp. of America v. City of New York*, 137 F.3d 81 (2d Cir. 1998) (assessing the validity of restrictions on operation at a heliport). Additionally, Congress appears to

have evinced an intent to codify the proprietary rights existing when the ADA was enacted rather than an intent to allow DOT to define proprietary rights. *Cf. Western Air Lines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952, 956 (S.D.N.Y. 1986) ("The legislative history of Section 1305(b)(1) indicates that the airport proprietor would be permitted to take those actions 'presently accepted as valid exercises of proprietary powers.' ") (internal citation omitted).

DOT, however, presents strong arguments supporting the contrary position. DOT is charged with administering the aviation laws as a whole. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 366-67 (5th Cir. 1994) ("The Secretary of Transportation is charged with administering the federal aviation laws. . . . "). More significantly, DOT is the "superintending agency" with respect to the administration of the ADA. *See American Airlines v. Wolens*, 513 U.S. 219, 229 n.6, 115A S. Ct. 817 n.6, 824, 130 L. Ed. 715, ___ (1995). The First Circuit has come close to holding that this power encompasses the authority to interpret the preemption section of the ADA. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 167 (1st Cir. 1989) (finding that DOT was one of "two judicial actors with apparent jurisdiction over the [preemption] subject matter which they decided"). Absent any clear evidence to the contrary, we are nearly persuaded that DOT possesses the authority to interpret the preemption provision of the ADA and that, consequently, we should defer to its interpretation of that provision. *See Texas Oil & Gas Ass'n*, 161 F.3d at 937. We need not, however, make this final determination here. Because we conclude that DOT's ruling that § 41713 of

the ADA preempted the Ordinance was correct under either standard of review, we decline to decide this issue at this time.

2

Congress passed the ADA in 1978 in an effort both to end federal economic regulation of commercial aviation and to promote competition within the airline industry. Fearful that in the face of federal deregulation, states would enact conflicting laws regulating the airline industry, Congress enacted § 41713(b)(1) of the ADA, which provides that:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1); *see also New England Legal Foundation*, 883 F.2d at 173 ("In reducing federal economic regulation of the field . . . Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation."). When enacting the ADA, however, Congress also recognized that airport proprietors – the majority of which are municipalities, *see City of Burbank*, 411 U.S. at 635, 93 S. Ct. at 1860, 36 L. Ed.2d at ___ – were best equipped to handle local problems arising at and around their facilities. Accordingly, the ADA provides that the preemptive effect of § 41713(b)(1) does "not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an

airport . . . from carrying out its proprietary powers and rights." 49 U.S.C.A. § 41713(b)(3).

The restrictions on service at Love Field under the Ordinance appear to operate as limitations "relating to . . . routes" within the meaning of § 41713(b)(1), *see Western Air Lines*, 658 F. Supp. at 952 (finding that a perimeter rule "relat[ed] to routes"), and the parties present no significant argument to the contrary. Consequently, the only issue before us is whether the power to enforce the restrictions falls within the proprietary powers exception. The Fort Worth petitioners contend that the restrictions on service at Love Field fall within Dallas's proprietary powers.

The precise scope of an airport owner's proprietary powers has not been clearly articulated by any court. *See, e.g., id.* at 956 ("The extent of 'proprietary powers and rights' has not yet been established."). However, several courts have examined when an airport owner's enactment of a "perimeter rule"[13] or similar route restriction falls within the proprietary powers exception. These courts have recognized that local proprietors play an "extremely limited" role in the regulation of aviation. *See,*

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[13] An airport perimeter rule "establish[es] maximum permissible distances of non-stop flights into and out of a given airport." *See* Jonathan Whitman Cross, *Airport Perimeter Rules: An Exception to Federal Preemption*, 17 Transp. L.J. 101, 102 (1988). The Wright Amendment itself, by allowing interstate service to only the four states bordering on Texas, operates as a perimeter rule. Similarly, because § 9.5 of the Bond Ordinance has been enforced so as to allow the range of flights permitted under the Wright Amendment, it effectively operates as a perimeter rule.

*e.g.*, *id.* at 956 ("[A]irport proprietors have an 'extremely limited role' in the system of aviation regulation. . . . ") (quoting *British Airways Bd. v. Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977)). In defining the permissible scope of a proprietor's power to regulate under § 41713(b)(3), federal courts have repeatedly held that an airport proprietor can issue only "reasonable, nonarbitrary, and nondiscriminatory rules that advance the local interest." *Id.* at 958; *see also National Helicopter Corp. of America*, 137 F.3d at 88-89 (limiting the permissible subject matter of local regulations to "aircraft noise and other environmental concerns at the local level"); *British Airways*, 558 F.2d at 84 (stating that a proprietor "is vested only with the power to promulgate reasonable, non-arbitrary and non-discriminatory regulations that establish acceptable noise levels for the airport and its immediate environs."); *cf. City and County of San Francisco v. FAA*, 942 F.2d 1391, 1394 (9th Cir. 1990) ("Congress made it clear, however, that the power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory.").

Courts applying this standard have upheld route restrictions as within proprietary powers when they are targeted at advancing a specific local interest. To date, courts have permitted airport proprietors to enact regulations aimed at monitoring noise levels, *see Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981), tempering environmental concerns, *see National Helicopter of America*, 137 F.3d at 88, and managing congestion, *see Western Air Lines Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222 (2d Cir. 1987). *See*

*generally Cross*, 17 Transp. L.J. at 106 ("An airport authority's proprietary function permits it to enact regulations benefitting citizens who live near the airport, such as airport noise regulations or airport curfews."). In each of these cases, the proposed restriction was targeted at alleviating an existing problem at the airport or in the surrounding neighborhood. For example, in *Western Air Lines*, the Second Circuit upheld a 1,500-mile perimeter rule enacted by the Port Authority at LaGuardia Airport as a reasonable means both of alleviating congestion at LaGuardia and of preserving the shorthaul status of that facility. *See Western Air Lines*, 817 F.2d at 226. More recently, the Second Circuit considered the validity of a special use permit that imposed significant restrictions on the use of a local heliport. *See National Helicopter Corp.* 137 F.3d 81. Finding that the proprietor exception allowed municipalities only to promulgate " 'reasonable, nonarbitrary and non-discriminatory' regulations of noise and other environmental concerns at the local level," *id.* at 88, the Second Circuit upheld only the restrictions that were aimed at reducing noise or other environmental concerns at the heliport. Significantly, the court struck down the restriction on sightseeing routes, finding that "Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." *Id.* at 92.[14]

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[14] In *City of Houston*, we touched upon the proprietary rights exception when we upheld the FAA's authority to enact a 1,000-mile perimeter rule at Washington National Airport. In that case, the FAA enacted the rule as a means of limiting traffic at National, preserving the short-haul status of National and assuring the utilization of the flagging Dulles Airport nearby. In

The only case which might support the Fort Worth Petitioners' view of Dallas's proprietary powers at Love Field is *Arapahoe County Public Airport v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). To the extent that *Arapahoe* holds that it is within an airport owner's proprietary powers to restrict service at a local airport without articulating a viable purpose for the restriction, we view that case as deviating from the generally accepted rule that we adopt here. In *Arapahoe*, the Colorado Supreme Court-without finding any purpose for the restriction beyond the proprietor's bald assertion that it would "strip" the airport Authority "of its ability and authority to manage the Airport," *see id.* at 591-upheld a municipal proprietor's ban on all passenger service at Centennial Airport, *see id.* at 595. We fear that under the rationale of *Arapahoe*, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception. This would expand the regulatory role of municipal owners far beyond the "extremely limited role" envisioned by the ADA.[15]

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relying on *City of Houston* for support, the Fort Worth Petitioners overlook the fact that we explicitly avoided engaging in a full analysis of the preemption provision in that case. Rather, we found that since the ADA preempted *state* regulation of routes, the restrictions of § 41713 did not apply to the FAA, a branch of the federal government. Thus, our decision in *City of Houston* does little to advance the Fort Worth Petitioners' argument.

[15] *Arapahoe* is also factually distinguishable from the present case. First, while in *Arapahoe*, the court found that the ban on passenger service did not constitute a restriction on "rates, routes or services" within the meaning of the ADA, the restrictions under the Ordinance clearly amount to route

We are not persuaded by the Fort Worth Petitioners' attempt to fit the restrictions at Love Field into the existing federal case law defining the scope of proprietary rights. On its face, the Ordinance is clearly not aimed at alleviating noise, pollution, or congestion at Love Field, nor do the Fort Worth Petitioners assert such claims. Rather, they extract from *Western Air Lines* and *City of Houston* an overly broad rule that it is within an airport owners' proprietary powers to allocate traffic between two airports so as to preserve the shorthaul nature of one facility. Such a contention misses the import of both cases; that a proprietor can enact a perimeter rule *if it articulates a need for the restriction*. The Fort Worth Petitioners seem to overlook the *Western Air Lines* court's repeated emphasis that the primary goal of the restriction was to reduce congestion at LaGuardia, and the allocation of traffic between LaGuardia and Kennedy Airports was a means of attaining this goal. The court specifically held that "a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor." *Western Air Lines*, 658 F. Supp. at 958. Similarly, to the extent that *City of Houston* touched upon

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restrictions. Second, the passenger service at issue in *Arapahoe* had never been permitted at Centennial Airport. In reaching its conclusion, the court emphasized that "[t]he power to control an airport's size exists at the core of the proprietor's function and is especially strong where, as here, the prohibited use has never been allowed, or even contemplated." *Arapahoe*, 956 P.2d at 595. In contrast, passenger flights on planes of all sizes have long been permitted at Love Field.

the scope of proprietary powers, we spent the bulk of our opinion emphasizing the fact that allocation of flights between Dulles and National was necessary to encourage use of Dulles Airport and ameliorate the overuse of National. *See City of Houston*, 679 F.2d at 1187. In neither case was re-allocation of flights between airports a goal in and of itself.

The fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive of this issue. We do not limit the scope of proprietary rights to those which have been previously recognized. *Cf. Western Air Lines*, 658 F. Supp. at 957 ("Section 1304(b)(1) [recodified as 41713(b)(1)] does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind."). Thus, we are open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under § 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exemption beyond its intended limited reach.[16]

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[16] Finally, we need not reach the question of whether there is a "multi-airport proprietor" requirement in either the case law or the ADA such that a local proprietor can only enact route restrictions that allocate between two airports if it owns both facilities. Since we find that the restrictions at issue here are impermissible regardless of ownership, the issue of whether

In sum, reviewing DOT's ruling *de novo*, we affirm the agency's determination that § 41713(b)(1) of the ADA preempted the Ordinance's restrictions on operations at Love Field. Clearly, under the less stringent *Chevron* review, DOT's interpretation of the preemption provision would also be reasonable. Under either standard, DOT's interpretation is affirmed.[17]

**B**

We next review DOT's ruling that the Wright Amendment's "commuter aircraft exemption" authorized carriers using jets with passenger capacity of 56 seats or less to engage in long-haul service from Love Field to any city in the United States. DOT ruled and argues on appeal that the "commuter aircraft exemption" imposes no geographical limitation on the service that can be provided with smaller aircrafts and therefore authorizes longhaul service at Love Field with any aircraft with a capacity of less than 57 passengers. Not surprisingly, intervenors Continental Express and Legend Airlines-each of whom plan to offer longhaul service out of Love Field on regional or reconfigured jets-agree with this position. The Fort Worth Petitioners contend that DOT misinterpreted the Love Field amendments and that the exemption authorizes only short-haul service at Love Field.

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Dallas controls both Love Field and DFW is irrelevant to our analysis.

[17] DOT alternatively ruled that the Wright and Shelby Amendments impliedly preempt the cities' ability to enforce the Ordinance. Because we find that the amendments expressly preempt enforcement of the Ordinance, we decline to address this issue here.

Because the DOT is authorized to administer the Wright and Shelby Amendments, *see Continental Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1449 (5th Cir. 1988) ("Here, Congress fashioned a specific provision which the agency (once CAB, now DOT) has been called upon to interpret."), we review its decision under the two-step *Chevron* analysis.

This inquiry most logically begins with a review of the statutory text. Subsection (a)(2) of the Wright Amendment exempts from the general ban against interstate flights at Love Field "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." § 29, 94 Stat. at 48. Section (a) of the Shelby Amendment defines the term "passenger capacity of 56 passengers or less" to include "any aircraft . . . reconfigured to accommodate 56 passengers or fewer if the total number of passenger seats installed on the aircraft does not exceed 56." § 377(a), 111 Stat. at 1447. A plain reading of these provisions appears to permit longhaul service at Love Field on a commuter airline with a passenger capacity of fewer than 57.[18]

The slightly more complicated issue here is what type of aircraft is covered under the "commuter airline"

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[18] In interpreting the commuter airline exemption in this manner, we keep in mind that Congress enacted the Love Field amendments with the intention of preserving Love Field as a primarily shorthaul facility. *Cf. Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991). We are, however, persuaded by DOT's argument that this interpretation will not undermine Love Field's status as a primarily short-haul airport since both the Wright and Shelby Amendments still place significant restrictions on the long-haul service permitted on larger jets.

exemption. DOT interpreted the commuter airline exemption as applying to any aircraft – whether a "regional jet" or turboprop plane – with a capacity of 56 passengers or less. Legend, Southwest, and Continental Express agree with this interpretation. The Fort Worth Petitioners, on the other hand, argue that the exemption in subparagraph (a)(2) of the Wright Amendment applies only to "commuter aircrafts" and not to regional jets. These differing views, in addition to Congress's failure to define the term "commuter airline," persuade us that the meaning of that term is ambiguous. *See Continental Air Lines*, 843 F.2d at 1454 ("The language of the [commuter airline exemption] is, we are persuaded, ambiguous."). Consequently, we turn to step two of *Chevron* and assess the reasonableness of DOT's interpretation.

The Fort Worth Petitioners contend that DOT erred in failing to interpret the phrase "commuter airline" as a limitation on the commuter aircraft exemption. As an initial matter, to the extent that American attempts to resurrect the argument that the term "commuter airlines" cannot refer to an air carrier offering longhaul service, we agree with and adopt the rationale of the District of Columbia Circuit in *Continental Air Lines*, 843 F.2d 1444. In that case, the court upheld as reasonable DOT's interpretation of the commuter airlines exemption as restricting the type of aircraft that could operate unrestricted service at Love Field rather than the class of airlines that could operate longhaul services at the facility. *See id.* at 1454-55.

Fort Worth presents a different argument, namely, that the term "commuter" limits the type of aircraft to the kind of turboprop aircrafts that were in use at the time

the Wright Amendment was enacted. Regional jets, it contends, "cannot qualify as 'commuter' aircraft." We disagree. First, Congress chose not to define "commuter airline" by reference to the kind of planes with a limited passenger capacity in 1979 and we decline to define that term for it here. *Cf. Continental*, 843 F.2d at 1454 ("First, Congress might have defined 'commuter airlines' with greater specificity by explicitly incorporating definitional references to agency regulations, but it chose not to do so. We cannot say that Congress meant to incorporate those regulatory definitions absent indications of its intention to do so in the statute or the legislative history."). Furthermore, to impose such a definition would essentially penalize those airlines who chose to update their technology as the airline industry advanced over the past twenty years.

Second, the Fort Worth Petitioners' definition of a "commuter airline" essentially renders the Shelby Amendment meaningless. The City of Fort Worth's contention that "the Shelby Amendment merely permits the use of reconfigured jet aircraft *if* the aircraft otherwise qualifies as a *commuter* aircraft" is nonsensical since, under its own definition of a "commuter airline," a reconfigured jet would *never* qualify as a commuter plane.[19]

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[19] The Fort Worth Petitioners also argue that DOT's interpretation violates the agency's previous ruling that Congress enacted the Wright Amendment in an effort to limit operations at Love Field to shorthaul service. In reality, Congress always permitted limited longhaul service at Love Field. From its inception, the Wright Amendment allowed for limited longhaul service on aircrafts with limited capacity and, as stated above, we do not think that DOT's ruling will radically alter Love Field's status as a primarily shorthaul airport.

The more rational view is that the term "operating aircraft with a passenger capacity of 56 passengers or less" as defined by the Shelby Amendment, defines the term "commuter airlines" so as to include all planes weighing less than 300,000 pounds, including regional jets, with a passenger capacity of less than 57. Thus, our reading of the commuter aircraft exemption therefore leads us to conclude that DOT's interpretation of the commuter aircraft exemption as permitting carriers using jets with a 56-passenger capacity to engage in longhaul service at Love Field is reasonable.

C

DOT found that, "[f]or the same reasons [the cities could not directly limit services from Love Field], the DFW Board may not prohibit or limit an airline's use of a competing airport" through the use agreements. DOT Order 98-12-27 at 52. Continental Express agrees with this ruling,[20] while the DFW Board, Dallas, and Fort Worth argue that the use agreements are not preempted. We again need not decide whether we must defer to DOT's

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[20] American filed a request to intervene and a request to file an intervenor's brief that conditionally supports DOT's ruling on the use agreement issue. Legend subsequently moved to strike American's proposed intervenor brief. American's request to intervene is untimely, *see* Fed. R. App. P. 15(d), and American has not shown that we should treat its proposed intervenor brief as a supplemental brief under 5th Circuit Local Rule 28.5. Accordingly, we DENY American's motions to intervene and to file a brief as an intervenor and DENY as moot Legend's motion to strike American's intervenor brief.

ruling on this point because we would uphold it even if we reviewed it *de novo*.

In determining whether government contracts are subject to preemption, the case law distinguishes between actions a state or municipality takes in a proprietary capacity – actions similar to those a private entity might take – and actions a state or municipality takes that are attempts to regulate. The former type of action is not subject to preemption while the latter is. For example, in *Building & Trades Council v. Associated Builders*, 507 U.S. 226, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993), the Supreme Court held that a labor contract was not preempted by the National Labor Relations Act because it was not "government regulation" but rather "constitute[d] proprietary conduct." *Id.* at 232, 113 S. Ct. at 1199, 122 L. Ed. 2d at ___. More recently, in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford, Texas*, 180 F.3d 686 (5th Cir. 1999), we considered whether a municipal ordinance and a contract entered into pursuant to that ordinance were preempted as "law[s], regulation[s], or other provision[s] having the force and effect of law." *Id.* at 691. Analyzing the contract and the ordinance in the same manner, we held that neither was preempted because both were valid exercises of proprietary power rather than impermissible attempts to regulate. *See id.* at 693-94; *see also Associated Gen. Contractors of America v. Metropolitan Water Dist. of S. Cal.*, 159 F.3d 1178, 1182-83 (9th Cir. 1998) (holding that labor contracts between a state entity and private groups were not "laws" because they were not efforts to regulate but rather "reflect[ed] an owner's desire to contractually assure peace and prosperity on particular projects").

Thus, the critical inquiry here is whether the use agreements represent a valid exercise of the cities' proprietary powers. This question is easily resolved. The use agreements are essentially coextensive with the Ordinance, indicating in their breadth an intent to achieve everything achieved by the Ordinance. *Cf. Cardinal Towing*, 180 F.3d at 694 (looking to the scope of the contract and the activity it covered to determine whether it represented an attempt to regulate). They were enacted to effect the Ordinance, and the most recent version of the agreements directly links the airlines' obligations to the terms of the Ordinance: "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth areas to, from and at the Airport, to the extent required by the terms of the 1968 Regional Airport Concurrent Bond Ordinance."[21] Given this overlap, for the same reasons we have already determined that the Ordinance is preempted as an improper attempt to regulate, we must determine that the use agreements are preempted as an impermissible attempt to regulate in an area where the federal government has preempted state regulation.[22] *See Skydiving Center of Greater*

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[21] Earlier versions of the use agreements and the original letter agreements contain similar language.

[22] Thus, this case is distinguishable from the Supreme Court's recent decision in *Wolens*, where the Court addressed a class action by passengers against an airline over changes the airline made to its air-miles program. *See Wolens*, 513 U.S. at 224-25, 115 S. Ct. at 822, 130 L. Ed. 2d at ___. The Court first found that the passengers' state consumer protection act claims were preempted by federal law, because their claims related to "rates" and "services." *See id.* at 228, 115 S. Ct. at 823-24, 130 L. Ed. 2d at ___. The Court proceeded to find, however, that the

*Washington, D.C., Inc. v. St. Mary's County Airport Comm'n*, 823 F. Supp. 1273, 1284 (D. Md. 1993) (finding that when federal law preempted a municipal corporation's ban on off-site parachute landings, it also preempted lease provisions between the corporation and the skydiving center that incorporated this ban by reference).

The parties favoring the use agreements contend that even if the use agreements were preempted, the signatories waived their preemption rights by voluntarily entering into the agreements. DOT rejected this argument by finding that any waiver was invalid as violative of public policy. *See, e.g., Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 900-01 (1945) (noting "that a statutory right conferred on

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plaintiffs could still pursue contractual claims against the airlines because, unlike the consumer protection statute, the contracts were "privately ordered obligations" which "did not amount to a State's enact[ment] or enforce[ment] [of] any law." *Id.* at 228-29, 115 S. Ct. at 824, 130 L. Ed. 2d at ___ (quotations omitted) (alterations in original). It based this finding in part on the fact that "[m]arket efficiency requires effective means to enforce private agreements." *Id.* at 230.

As several of the parties note, *Wolens* is distinguishable from this case because it did not involve a contract entered into by a state. Instead, the contracting parties in *Wolens* were private actors. Thus, the only question of state regulation in *Wolens* was the more tangential question of whether the contract could be enforced in state court. *See id.* at 229 n.5, 115 S. Ct. at 824 n.5, 130 L. Ed. 2d at ___.

Additionally, although *Wolens* referred to the importance of contracts in ensuring "market efficiency," there has been no convincing showing here that the parties entered into the use agreements for this purpose. Instead, it seems that they entered into the use agreements to implement an agreement between the cities to regulate airport use in the Dallas-Fort Worth area.

a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy," and holding that in the case before it, employees could not waive their private rights to liquidated damages because of the public interest at stake).

We need not address the waiver issue because we find it inapplicable here. Section 41713 does not expressly announce affirmative rights for airlines, but instead bars states from regulating in certain areas. The airline signatories cannot "waive" this preemption because there is no indication that the federal preemption is limited to granting them individual rights. *Cf. Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769, 771 (E.D. Tenn. 1975) (holding, without analysis, that "[t]he lease indenture of June 16, 1969 between American and the authority violates 49 U.S.C. § 1349(a), a statute enacted for the protection of the public, in so far as it grants American the exclusive right for the use of the landing area and the air navigation facility at the airport.").

D

Finally, we review DOT's ruling that the Wright Amendment permits an airline to offer through service from Love Field to points outside the Love Field service area as long as the airline uses a city within Texas as a connecting point and a 56-passenger aircraft to get to that point.[23] While DOT, Continental Express, and Legend

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[23] As an initial matter, we clarify the precise issue addressed in DOT's Declaratory Order. DOT purportedly

Airlines argue that we should uphold this ruling, every other party to this action – Dallas, Fort Worth, the DFW Board, Southwest Airlines, and American Airlines – contends that permitting an airline to offer through service between Love Field and "the world" violates both the plain meaning of and the congressional intent behind the Wright Amendment. Once again, since DOT is charged with administering the Wright Amendment, we review its ruling under the two-step *Chevron* analysis. *See Texas Oil & Gas Ass'n*, 161 F.3d at 937-38.

This issue arose from Continental Express's decision to offer and advertise through service between Love Field and "the world." Continental Express flies passengers from Love Field to Houston's Intercontinental Airport on an aircraft with a maximum capacity of 56 passengers and then transfers them to worldwide flights on large jets. Passengers taking advantage of this service receive one ticket and, though they must change planes, do not

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determined "[w]hether the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city *within the seven-state area* as a connecting point and uses aircraft with no more than 56 seats for its flights between Love Field and the connecting point." Declaratory Order at 18 (emphasis added); *see also* DOT Procedural Order at 3 (Sept. 3, 1998). The substance of DOT's ruling, however, is geared towards the specific service offered by Continental Express and therefore considered solely whether the Love Field amendments permit an airline to offer through service through a point *within Texas*. We limit the scope of our review to the narrower question actually resolved by DOT.

have to reclaim and recheck their luggage at the connecting point.

As discussed above, subsection (a)(2) of the Wright Amendment excludes from section (a)'s general prohibition against interstate transportation flights out of Love Field that are operated on an aircraft with a capacity of 56 passengers or less. Subsection (c) of the Amendment permits flights between Love Field and any point in Texas or one of the four contiguous states (later expanded to seven) on any size aircraft as long as "(1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State." § 29, 94 Stat. at 48.

DOT interpreted subsection (a)(2) as authorizing the service offered by Continental Express. More specifically, DOT reads the commuter airlines exemption to exempt planes with a passenger capacity of less than 57 from all restrictions in the Wright Amendment. Under this interpretation, the restrictions on service in subsection (c)-including the restrictions on through service-do not apply to aircrafts operating under the commuter airline exemption. In contrast, the Fort Worth Petitioners, Southwest Airlines, and the City of Dallas contend that DOT's interpretation violates the plain language of the Wright Amendment. Under their interpretation of the statute, the restrictions on service in subsection (c)(2) apply to both commuter flights under subsection (a)(2) and flights on large aircrafts.

These two plausible yet conflicting readings of the relevant provisions of the Wright Amendment, coupled with a lack of legislative history illuminating the proper interaction between subsections (a)(2) and (c)(2), convince us that Congress did not speak directly to the issue before us. Accordingly, we move to step two of *Chevron* and inquire whether DOT's interpretation is a reasonable one. Under *Chevron*, an agency's interpretation is "reasonable" if it is "not patently inconsistent with the statutory scheme." *See Continental*, 843 F.2d at 1452 (citations omitted). We need not agree with DOT's interpretation in order to uphold it as reasonable. *See Exxon Corp. v. Lujan*, 970 F.2d 757, 761 (10th Cir. 1992) ("The agency's interpretation need not be the only one it could have adopted, or the one that this court would have reached had the question initially arisen in a judicial proceeding.") (citation omitted).

We are persuaded that DOT's interpretation of the Wright Amendment is a permissible one within the meaning of *Chevron*. DOT grounds its ruling largely on the argument that by imposing an express restriction on through service on large jets operating under subsection (c)(2) but declining to impose a similar restriction on commuter planes operating under section (a)(2), Congress was evincing its intent to permit small aircrafts to fly without such a restriction.[24] We view this reading of

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[24] Each party opposing DOT's position argues that it conflicts with the agency's 1985 Order holding that Continental could not provide interlining service on a large jet through a connecting point in Texas. *See* Love Field Amendment Proceeding, DOT Order 85-12-81, 1985 WL 57886 (1985). In that interpretive proceeding, DOT addressed whether airlines could

the amendment as reasonable and not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some longhaul service. *See* H.R. Conf. Rep. 96-716, at 24 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 86 (stating that the Wright Amendment "embodies a compromise which permits limited commercial passenger service in interstate transportation at Love Field.").

This is not to say that we find DOT's interpretation to be the only or the best reading of the Wright Amendment. In order to reach its decision, DOT necessarily defined "air transportation on 56-passenger capacity planes" as including air service provided *in part* by such aircrafts. Similarly, it implicitly defined intrastate service as including flights with only an intrastate portion. These interpretations strain the meaning of both terms. Furthermore, we note with concern the potential impact of DOT's ruling. While it seems unlikely that permitting interstate service outside of the Love Field service area on small planes would have any impact on DFW's role as the Dallas area's primary long-haul facility, it seems significantly more likely that following the DOT ruling, airlines

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provide interlining service exclusively on large planes. There, DOT essentially agreed with an earlier CAB ruling that an air carrier could not "evade the [Wright] Amendment's restrictions by providing flights, for example, between Love Field and Houston and then continuing the flights between Houston and points outside the five-state area." 1985 WL 57886, at *11 (citation omitted). We agree with DOT that its previous interpretation can be distinguished on the grounds that DOT premised its earlier order on an interpretation of section (c)(2) of the Wright Amendment, whereas the agency's decision here relies primarily on an interpretation of section (a).

who already operate small aircrafts will commence interlining service connecting in Houston or another Texas airport. However, determinations of this nature are directly within DOT's expertise, not ours, and we will not substitute our judgment on aviation-related issues for their reasonable one. Accordingly, we affirm DOT's ruling as a reasonable interpretation of the Wright Amendment.

## V

For the foregoing reasons, we DENY the petitions for review and AFFIRM DOT's orders.

## APPENDIX B

**Posted 12/22/98** **Order 98-12-27**

**[LOGO] 6:00 P.M.** **SERVED December 23, 1998**

**UNITED STATES OF AMERICA**
**DEPARTMENT OF TRANSPORTATION**
**OFFICE OF THE SECRETARY**
**WASHINGTON, D.C.**

Issued by the Department of Transportation
on the **22nd day of December, 1998**

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| LOVE FIELD SERVICE INTERPRETATION PROCEEDING | : | Docket OST-98-4363 |

### DECLARATORY ORDER

The Cities of Dallas and Fort Worth agreed in 1968 to create Dallas-Fort Worth International Airport ("DFW") as the metropolitan area's primary airport. The two cities agreed to phase out service at their local airports, which included Love Field, owned and operated by the City of Dallas, and cause the airlines serving the area to use DFW for all interstate flights. The cities' goal of prohibiting all interstate service at Love Field conflicted with Southwest Airlines' plans to use the airport for interstate service. Congress therefore enacted a federal statute authorizing a limited amount of interstate service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) ("the Wright Amendment"). Last year Congress amended the Wright Amendment to authorize additional interstate service at Love Field. Section 337 of the Department of Transportation

and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment").

In response to Congress' enactment of the Shelby Amendment, Fort Worth filed a suit in the Texas state courts seeking to compel Dallas to block any airline from operating the additional types of service authorized by that statute. Fort Worth's filing led to additional litigation in the state and federal courts, including a declaratory judgment suit filed by Dallas against this Department and Fort Worth. In general, Fort Worth, joined by American Airlines and the DFW Board, contend that, under the cities' 1968 agreement, Dallas may allow airlines to operate only those Love Field services permitted by the Wright Amendment. Dallas, Continental Express, Southwest Airlines, and Legend Airlines (a proposed new entrant that plans to operate longhaul service from Love Field with aircraft reconfigured to hold no more than 56 seats) contend that the federal law overrides the cities' agreement and that Dallas must allow airlines to operate the additional services authorized by the Shelby Amendment.

The litigation led most of the parties to ask the Department to intervene in some manner in the dispute. The Department began this proceeding to issue an interpretation of the meaning of the relevant federal statutes in light of the parties' requests and the importance of the issues. Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. *See, e.g., Cramer v. Skinner,* 931 F.2d 1020, 1024 (5th Cir. 1991), *cert. denied,* 502 U.S. 907. The Department's issuance of an

order addressing issues involving Love Field is not without precedent. The Department held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985). The Court of Appeals affirmed the Department's interpretation of the Wright Amendment. *Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988).

The Department has received comments and reply comments from all of the parties in the litigation, as well as several airport parties, the unions representing the pilots at American and Southwest, the Love Field Citizens Action Committee, and Delta Air Lines. In general, the parties in the litigation have taken the same position in their pleadings as they have in court. Fort Worth, American, and the DFW Board also urge the Department to dismiss this proceeding, while Dallas, Southwest, Continental Express, and Legend assert that the Department should issue a ruling on the federal law issues.

After considering all of the parties' arguments, the Department has concluded that it has the authority and responsibility to issue rulings on the federal law issues presented by the dispute over additional airline service at Love Field. The Department finds that the restrictions on Love Field service sought by Fort Worth, American Airlines, and the DFW Board are contrary to federal law and that the Wright and Shelby Amendments largely permit (i) unrestricted longhaul service with aircraft containing a passenger capacity of 56 passengers or less and (ii) flights with larger aircraft to cities in Kansas, Mississippi, and Alabama, as explained in this order. The Department is

simultaneously issuing a separate order that addresses the parties' various procedural motions in this proceeding.

The Department's decision that Dallas may not block airlines from operating services authorized by the Shelby Amendment reflects Congress' intent in enacting the Wright and Shelby Amendments and follows earlier decisions by the courts and federal agencies interpreting the relevant federal statutes.

This decision is also consistent with the FAA's recent preliminary determination in an administrative proceeding that a Colorado airport may not prevent an airline from operating scheduled service when the airport allowed comparable flight operations by other firms. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority,* FAA Docket Nos. 16-98-05 *et al.,* Director's Determination (issued August 21, 1998).

The Department is not holding that Dallas has no authority to limit the level of operations at Love Field. Airport operators may not regulate airline routes, as Fort Worth seeks to do, but airport owners have authority to regulate most aspects of airport operations. The Department's interpretation here does not place in question the legitimate management rights of airport owners. The Department is also basing its decision on current circumstances. No one has tried to show in this proceeding that the additional services authorized by the Shelby Amendment could jeopardize DFW's role as the area's principal airport.

## FACTUAL AND LEGAL BACKGROUND

### The Cities' Agreement to Build DFW and Phase-Out Service at the Local Airports

The restrictions on Love Field service initially grew out of the two cities' settlement of a long-standing dispute over the Dallas-Fort Worth area's airline operations. For many years Dallas and Fort Worth operated separate airports (Love Field was the Dallas airport) and fought over which airport should be the metropolitan area's principal airport. The two cities resolved the dispute in the 1960s by agreeing to build DFW to replace their local airports and to end virtually all airline service at Love Field and Fort Worth's local airports. The cities' agreement resulted in large part from the threat by the Civil Aeronautics Board ("the Board") that it might consolidate all of the area's service at one of the local airports if the cities did not settle their dispute. *See City of Dallas, Texas v. Southwest Airlines*, 371 F.Supp. 1015, 1019-1021 (N.D. Tex. 1973), *aff'd on different grounds*, 494 F.2d 773 (5th Cir. 1974).

Before the cities settled their dispute, Fort Worth's major airport was Greater Southwest International Airport, which was demolished as a result of DFW's construction. Fort Worth has another airport, Meacham Field, still useable by airlines. Love Field was the Dallas airport used by the scheduled airlines.

Each airline then serving Love Field under certificate authority granted by the Board agreed to operate all of its interstate service at DFW. *See City of Dallas, Texas, supra*, 371 F. Supp. at 1020-1021. Southwest, however, was operating intrastate flights under state authority and refused

to move. Its refusal led to years of litigation, as described below.

The Wright Amendment has allowed Southwest to provide interstate service from Love Field and points in the four states bordering Texas. Despite Southwest's continuing use of Love Field for interstate service, DFW became the area's primary airport, as the cities desired, and has grown from 11.3 million enplaned passengers in 1979 to 60.5 million enplaned passengers in 1997. Continental Express Reply at 2.

Dallas and Fort Worth currently own DFW, which is managed by the DFW Board. The DFW Board is a local governmental body created and authorized under state law to be the owner and operator of DFW.

The Terms of the Bond Ordinance

As part of their agreement, the two cities jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"). Whether the Bond Ordinance limits Love Field service, and whether Dallas may enforce any such limitations, lie at the heart of the parties' current dispute. Exhibit 8 to the DFW Board's comments is a copy of the Bond Ordinance. The key provision is section 9.5, which obligated each city to move scheduled interstate services to DFW as far as "legally permissible." Section 9.5A sets forth the cities' obligation to transfer interstate airline services to DFW:

> It is acknowledged and understood by the Cities that they, in Love Field, Redbird, GSIA, and Meacham Field, own and operate airports which

> by their nature are potentially competitive with the operation of the Regional Airport [DFW]. It is further acknowledged that and recognized that the revenues to be derived from those airport facilities are not, under the terms of this Ordinance, pledged to the payment of the Bonds, except under the circumstances described in Section 6.3 hereof. Accordingly, the Cities each with respect to its own individually owned airport facilities, as above named, hereby covenant and agree that from and after the effective date of this Ordinance, shall take such steps as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport effective upon the beginning of operations at the Regional Airport.

This section gives the DFW Board some authority to waive this restriction:

> From time to time hereafter, the [DFW Board] may review the effect and application of such covenant, and by concurring action of not less than eight (8) of its members, the Board may reasonably limit its scope and effect and may waive its application in specific instances if it shall first determine that such action is necessary (1) in the interest of public safety; (2) in the interest of prudent and efficient operations at [DFW]; or (3) in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort

> Worth metropolitan region considered as a whole.

The DFW Board may not grant such a waiver if doing so would substantially reduce DFW's revenues as defined in the agreement.

Related obligations are contained in Section 9.5B of the Bond Ordinance, which reads in part as follows:

> In addition to the covenant of the Cities contained in [paragraph 9.5A], the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the [DFW Board] will undertake with regard to the Regional Airport, Love Field, GSIA, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and the use of its lands and facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced or destroyed.

The Bond Ordinance's definition of "Certificated Air Carrier Services" includes (i) scheduled interstate services operated under certificate authority granted by the Board or any successor agency, (ii) scheduled services operated

by foreign airlines under authority granted by the Board or any successor agency, and (iii) scheduled intrastate services operated under authority granted by the Texas Aeronautics Commission or any successor agency. The definition excludes services provided by "air taxis" under exemption authority granted by the Board or the Texas agency. Section 2.1G.

The Bond Ordinance by its terms does not prohibit all interstate service at Love Field. It conditions the cities' obligation to transfer services to DFW by requiring them to take that action "as may be necessary, appropriate, and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action)." As explained below, in the first round of litigation over Southwest's use of Love Field, the district court read the Bond Ordinance as requiring the phase-out of interstate service only insofar as permitted by law. *City of Dallas, supra,* 371 F. Supp. at 1019, 1035.

Southwest's Efforts to Use Love Field

After DFW opened, Dallas kept Love Field open for limited uses. When Southwest refused to move to DFW, Dallas, Fort Worth, and several competing airlines repeatedly tried to compel Southwest to stop using Love Field, primarily through litigation.

Dallas and others filed a suit in federal district court to force Southwest to move out of Love Field to DFW. In that case the district court held on several grounds that Dallas could not block Southwest from using Love Field. *City of Dallas, Texas v. Southwest Airlines, supra,* 371 F. Supp. at 1015. Among other things, the city's efforts to

stop Southwest's service violated its obligation under federal law not to discriminate among airport users. 371 F. Supp. at 1028-1030. While the Bond Ordinance prohibited intrastate flights by airlines like Southwest operating under state authority, it allowed airlines operating under federal certificate authority to operate intrastate flights and allowed non-certificated commuter airlines to operate at Love Field. 371 F. Supp. at 1027-1028, 1031. The court additionally held that Dallas could not block Southwest from using Love Field when the Texas Aeronautics Commission had specifically authorized Southwest to operate intrastate flights from Love Field. 371 F. Supp. at 1032-1034. The court concluded that it did not need to invalidate the Bond Ordinance provision requiring the phase-out of most scheduled service at Love Field, since that provision specifically obligated Dallas to take such action only to the extent that it was legally permissible. Dallas could not legally force Southwest to move to DFW. 371 F. Supp. at 1034-1035.

On appeal the Fifth Circuit affirmed the district court's holding that Dallas could not block Southwest from using Love Field when the Texas agency had specifically authorized Southwest to use that airport. *City of Dallas, Texas v. Southwest Airlines, supra,* 494 F.2d 773. The Fifth Circuit did not address the other grounds relied upon by the district court.

A second round of litigation resulted from Dallas' adoption of an ordinance imposing a $200 fine for each takeoff and landing by a commercial airline at Love Field. The district court enjoined Dallas from enforcing this ordinance. *See Southwest Airlines v. Texas International Airlines,* 396 F. Supp. 678, 680, 682 (N.D. Tex. 1975).

Several airlines that used DFW and competed with Southwest created a third round of litigation. After the Fifth Circuit held that Southwest was entitled to use Love Field, these airlines asked a state court to end Southwest's use of the airport. Their action caused the district court to enter an injunction barring any litigation that sought to overturn the court's decision that Southwest had the right to operate at Love Field. *Southwest Airlines v. Texas International Airlines*, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir. 1977).

The district court later entered a permanent injunction, which, as described below, is the basis of Southwest's motion asking the court to enforce the injunction against Fort Worth (Exhibit 7 in Dallas' comments is a copy of the injunction). Southwest claimed that Fort Worth violated the injunction by suing Dallas and asking the state court to grant relief that would limit Southwest's Love Field flights.

## The Enactment of the Wright Amendment

When the two cities built DFW, airline routes, rates, and services were extensively regulated by the Board. Southwest avoided Board regulation by operating as an intrastate airline. After Congress deregulated the airline industry in 1978, Southwest wished to begin interstate service. It applied for federal authority to serve the Love Field-New Orleans route under the so-called "automatic entry" provision in the deregulation act. Dallas, Fort Worth, and others opposed Southwest's application. The Board granted the application since it had no power to

deny it. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979).

This Board decision led to Congress' enactment of the Wright Amendment limiting interstate passenger service at Love Field. Section 29 of the International Air Transportation Competition Act of 1979, P.L. 96-192, 94 Stat. 35, 48-49 (1980) (the amendment has never been codified).

Congressman Jim Wright of Fort Worth offered an amendment to a bill deregulating international air transportation. His amendment, adopted by the House, would have prohibited all interstate service at Love Field (other than commuter airline operations), as demanded by Dallas and Fort Worth. *See* H.R. Rep. No. 96-716, 96th Cong., 1st Sess. (1979), at 24; exhibit 19 to the DFW Board's comments is a copy of the conference committee report. The Senate, however, refused to ban interstate service at Love Field. The conference committee created the Wright Amendment, which allowed a limited amount of interstate service at Love Field. *See* H.R. Rep. No. 96-716 at 24-26.

The Wright Amendment reads as follows:

> (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more

points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

The amendment thus prohibited interstate scheduled passenger service at Love Field, subject to four exceptions. The three exceptions created by subsections (a) and (b) allowed (i) unrestricted service using aircraft seating no more than 56 passengers (we will refer to this exception as the "commuter aircraft exemption"), (ii) ten charter flights per month, and (iii) the interstate services that existed on November 1, 1979. Subsection (c) additionally allowed airlines to operate Love Field flights to or from points in Texas, New Mexico, Oklahoma, Arkansas, and Louisiana ("the Love Field service area") but barred the sale of through transportation between the endpoint of such a Love Field flight and any point outside the Love Field service area. Thus, if a traveller wished to fly from Love Field to a point outside the Love Field service area, the traveller could transfer at the endpoint of a Love Field flight to another flight going to the point outside the Love Field service area, but the traveller had to buy a separate ticket for each flight and could not check his or her luggage through from Love Field to the final destination. See *Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 298.[1]

The conference committee report stated that this amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority,

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[1] The courts upheld the Constitutionality of the restrictions on Love Field service in *Cramer* and in *State of Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994).

and related constituent groups." H.R. Rep. No. 96-716 at 24. The report further stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26.

As noted, the Bond Ordinance had prohibited all scheduled interstate service from Love Field except air taxi service, to the extent legally permissible. The Wright Amendment, on the other hand, allowed airlines to operate some interstate service. Dallas and Fort Worth, however, never amended the Bond Ordinance to reflect these changes. Thus the Bond Ordinance by its terms, as construed by Fort Worth, prohibits interstate services which may be operated (and which Southwest has been operating) under the Wright Amendment. *See* Dallas Reply at 12. In addition, another airline – Muse – operated a significant amount of interstate service at Love Field under the Wright Amendment. *Analysis of the Impact of Changes to the Wright Amendment*, Interdepartmental Task Force on the Wright Amendment (July 1992), at 9.

Southwest has used the Wright Amendment's authorization for unrestricted short-haul service to greatly expand its interstate service at Love Field consistently with the statutory restrictions.

The Department's Earlier Order Interpreting the Wright Amendment

In 1985 the Department issued an order interpreting the Wright Amendment due to an earlier controversy over

Love Field service. Continental then proposed to begin operating flights between Love Field and Houston with large aircraft (not aircraft with a passenger capacity of 56 passengers or less). DFW, Dallas, Fort. Worth, and Southwest opposed Continental's plans, primarily because the Wright Amendment allegedly barred Continental from serving Love Field since it interlined with other airlines elsewhere in its system. Several of these parties asked us to block Continental's proposed service. *See* Order 85-7-65 (July 26, 1985).

This dispute led the Department to issue an order interpreting the statutory restrictions. Order 85-12-81 (December 31, 1985), *aff'd, Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988). The Department held that an airline that interlined elsewhere on its system could operate interstate flights from Love Field as long as it did not provide interline or through service from Love Field to points outside the Love Field service area, that any airline could operate Love Field flights under the commuter aircraft exemption as long as it used aircraft with a passenger capacity of 56 passengers or less, and that no airline could advertise the availability of service from Love Field to points beyond the Love Field service area.

Despite the Department's decision, Dallas refused to lease any facilities to Continental for its Houston flights. Continental then filed a state court suit against Dallas, which argued that Continental's proposed service would violate the Bond Ordinance and Continental's use agreement with DFW, which required compliance with the Bond Ordinance. Fort Worth and the DFW Board supported Dallas. The Texas Court of Appeals held that

Continental's agreement with DFW allowed it to operate the Love Field-Houston service, since the service would be intrastate and therefore permitted by the agreement. *City of Dallas v. Continental Airlines*, 735 S.W. 2d 496 (Tex. Ct. App. 1987). The court agreed with the Department's conclusion that Continental's proposed service would be intrastate service. Continental, however, never began operating the Houston-Love Field service.

The Department's Love Field Study

In the early 1990s members of Congress from Kansas and other states outside the Love Field service area sought a repeal or loosening of the Wright Amendment. The Texas Congressional delegation opposed their efforts. As a result of this Congressional debate, the Department prepared a report on the likely effects of changing the restrictions on Love Field service. *Analysis of the Impact of Changes to the Wright Amendment*, Interdepartmental Task Force on the Wright Amendment (July 1992) ("*Love Field Study*"). The study analyzed the impact of two possible changes: (i) a repeal of the Wright Amendment and (ii) a modification allowing nonstop flights of up to 650 miles and through service to any beyond destination.

The study concluded that expanding Love Field service would greatly benefit the Dallas-Fort Worth metropolitan area, *Love Field Study*, Executive Summary at 1; that allowing additional service at Love Field "will have little if any impact on Dallas-Fort Worth Airport's growth" and that "[t]he overall impact on Dallas-Fort Worth Airport from a diversion of service to Love Field (or any change in the Wright Amendment under the existing scenarios) is

negligible . . . ," *id.* at 10, 31; and that "[u]nder all possible scenarios, Dallas-Fort Worth Airport will continue to grow and remain the area's dominant airport," *Love Field Study*, Executive Summary at 1.

The Department submitted the report to Congress but made no recommendation on whether the Wright Amendment should be repealed or modified. Congress took no action.

Proposals to Use Reconfigured Aircraft.

In 1996 Dalfort Aviation, Legend's parent, developed a plan to use reconfigured large aircraft (B-737's, B-727's, or DC-9's) to operate longhaul service at Love Field under the commuter aircraft exemption. Dalfort planned to remove all but 56 seats from its large aircraft and then operate flights from Love Field to points outside the Love Field service area. Dalfort argued that its proposed operations would be lawful under the commuter aircraft exemption. Dalfort requested a legal opinion from the Department on whether its proposed operations were permitted by the Wright Amendment.

On September 19, 1996, the Department's General Counsel, Nancy E. McFadden, issued an opinion that held that the commuter aircraft exemption applied only to aircraft originally designed to hold no more than 56 seats. Since Dalfort intended to use larger aircraft reconfigured to come within the 56-passenger capacity limit, Dalfort's proposal would be unlawful.[2]

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[2] The General Counsel's conclusion was consistent with a May 16, 1994, ruling by Rosalind A. Knapp, the Department's

Dalfort sought judicial review of the opinion. *Astraea Aviation, d/b/a Dalfort Aviation v. U.S. Department of Transportation*, 5th Cir. No. 96-60802 (filed November 18, 1996). The Shelby Amendment made the case moot before it was decided. As noted below, the parties' stipulation to dismiss the case stated that Legend could operate longhaul flights permitted by the Shelby Amendment; exhibit 12 to Dallas' comments is a copy of the stipulation.

The Shelby Amendment.

Congress addressed the General Counsel's opinion by enacting the Shelby Amendment, section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L.No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997). The amendment originated in the Senate Appropriations Committee, whose Chairman is Senator Richard Shelby.

As revised by the conference committee, the Shelby Amendment authorized increased Love Field service in two ways. First, it modified the commuter aircraft exemption so that it expressly exempts service operated by any aircraft reconfigured to hold no more than 56 seats, unless the aircraft's gross aircraft weight exceeded 300,000 pounds. Secondly, the amendment added three states – Kansas, Mississippi, and Alabama – to the Love Field service area (the states within which unrestricted

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Deputy General Counsel, on a similar proposal made by Centennial Express. Centennial Express planned to use reconfigured large aircraft to operate service between Denver's Centennial Airport and Love Field.

service with large aircraft may be operated from Love Field).

The Shelby Amendment reads as follows:

> (a) IN GENERAL – For purposes of the exception set forth in section 29(a)(2) the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.
>
> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION – The first sentence of section 29(c) of [the Wright Amendment] is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".
>
> (c) SAFETY ASSURANCE – The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an unsafe airspace management situation existed requiring the restrictions.

The Shelby Amendment has already resulted in new service at Love Field, for Southwest is offering through

service from Love Field to Jackson, Mississippi, and Birmingham, Alabama. The Wright Amendment had prohibited such service. Southwest alleges that these new services have enabled travellers to obtain much lower fares – the lowest unrestricted one-way fares in the Dallas-Jackson and Dallas-Birmingham markets fell from $324 and $480, respectively, to $149 and $189, respectively, when Southwest began through service. Southwest Comments at 16.

In addition, Legend, a start-up airline, and Continental Express have planned to begin new interstate service. Legend wishes to operate longhaul service from Love Field with large aircraft reconfigured to hold no more than 56 seats. Continental Express planned to operate Love Field-Cleveland flights with regional jets having no more than 56 seats, but the state court has temporarily enjoined that service (as explained below, the Wright Amendment would have allowed Continental Express to operate these Cleveland flights).

Both Continental Express and American have begun operating intrastate flights at Love Field – Continental Express to Houston, a hub for its affiliate, Continental Airlines, and American to Austin. American operates fourteen daily roundtrip flights to Austin. Continental Express Comments at 1; Legend Comments at 46-47. The DFW use agreements and the Bond Ordinance do not prohibit intrastate service at Love Field and thus allow these American and Continental Express flights.

Other Statutes

Other federal statutes applicable to all airports also govern Dallas' operation of Love Field. A key statutory section, 49 U.S.C. 41713(b), preempts state and local government regulation of airline routes, fares, and services. *See, e.g., American Airlines v. Wolens*, 513 U.S. 219 (1995). However, this section contains an exception allowing a local government that owns an airport to exercise its proprietary powers as the airport's owner. 49 U.S.C. 41713(b)(3). Congress enacted this provision as section 4 of the Airline Deregulation Act of 1978, P.L. No. 95-504, 92 Stat. 1705 (1978).

As discussed below, the applicability here of the preemption provision with its exception allowing airport owners to exercise their proprietary powers is a key issue in the Love Field dispute. Fort Worth and the parties agreeing with Fort Worth claim that the restrictions sought by them may be implemented by Dallas in its capacity as Love Field's owner; Dallas and the parties opposing Fort Worth contend that Dallas may not impose such restrictions.

Dallas has also obligated itself to comply with the grant assurances required when airports accept FAA Airport Improvement Program grant funds, for Dallas has obtained federal grants for Love Field. Dallas Comments at 2, 15. Those assurances, imposed under 49 U.S.C. 47107, require among other things that the airport be available for public use on reasonable terms and conditions and bar the airport from unjustly discriminating against any user. 49 U.S.C. 47107(a)(1).

The Current Litigation

State Court Litigation. The Shelby Amendment is at the core of the current litigation over Love Field service. Before the President signed the appropriations bill containing the Shelby Amendment, Fort Worth filed a state court suit against Dallas, Legend, and others to block additional service at Love Field. *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997). American Airlines and the DFW Board supported Fort Worth's position in this case.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field-Cleveland flights pending the court's final decision. The DFW Board argued that Continental Express' Cleveland flights should be enjoined since Continental Express' parent corporation, Continental, had signed a use agreement that barred it from operating interstate service at Love Field.

On October 15 the state court granted the summary judgment motions filed by Fort Worth, American, and the DFW Board against Dallas, Continental Express, and Legend. The court found that Dallas was obligated by the Bond Ordinance (as amended by the Wright Amendment) to bar airlines from operating services authorized by the Shelby Amendment and that federal law did not override the cities' agreement restricting Love Field service. *See* Fort Worth Report on Status of "Fort Worth Action." The court did not issue an opinion explaining the basis for this decision.

Continental Express initially appealed the grant of the temporary injunction but withdrew the appeal after the

trial court's summary judgment decision. Continental Express and Legend have publicly stated that they will appeal that decision.

Federal Court Litigation. After Fort Worth sued Dallas in state court, Dallas filed a federal court suit against this Department and Fort Worth to obtain a declaratory judgment that Dallas may not bar airlines from operating service authorized by the Shelby Amendment. *City of Dallas, Texas v. Department of Transportation et al.*, N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). To protect plans to begin flights from Love Field to Houston and Cleveland, Continental Airlines and Continental Express filed their own suit, *Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth*, N.D. Tex. No. 398CV1187-R (filed May 19, 1998). The federal court has consolidated these suits. It had set January 1999 as the deadline for filing summary judgment motions but recently vacated that schedule.

The earlier federal court litigation between Southwest, the two cities, and other parties over Southwest's right to use Love Field had resulted in the issuance of an injunction barring efforts to interfere with the court's decision that Southwest was entitled to continue using Love Field. *Southwest Airlines and Texas Aeronautical Comm'n v. Texas International Airlines et al.*, Order Granting Permanent Injunction (February 23, 1982), N.D. Tex. No. CA 3-75-0340-C. On March 27, 1998, Southwest moved to reopen that proceeding to ensure its ability to operate additional service from Love Field. The district court denied Southwest's request for an order enforcing its

rights after Fort Worth represented that it had no intention of interferring with Southwest's operations. *See* Southwest Comments at 17-18.

Related Administrative Proceedings

Administrative Complaint. On November 17, Legend filed a complaint with the FAA against Fort Worth, the DFW Board, and American that charges them with violating federal law. Legend asked the FAA to terminate all aviation grants for Fort Worth.

The FAA dismissed the complaint on December 7. The FAA concluded that Legend's request to enforce the grant restrictions applicable to Love Field was misdirected, since Legend filed the complaint against Fort Worth and the DFW Board, not Dallas. In addition, the FAA stated that it would not investigate complaints about a violation of the statutory preemption provision, 49 U.S.C. 41713, unless the complaint alleged conduct that would also be an unreasonable or unjustly discriminatory restriction on aircraft access by an airport operator under its Airport Improvement Program grant assurances.

Legend's Certificate Application. Legend has filed an application for certificate authority under 49 U.S.C. 41102 so that it may begin airline operations. Docket OST-98-3667. Fort Worth is opposing Legend's application in part by arguing that Legend's proposed service – longhaul flights from Love Field operated with reconfigured large aircraft – would violate the Wright Amendment. Fort Worth Answer at 13-17, Docket OST-98-3667. Fort Worth urged the Department to delay ruling on Legend's application until the state court had decided

whether Legend's proposed service would be lawful. *Id.* at 21-22. American filed an answer concurring with Fort Worth's position.

The Department has issued a show-cause order tentatively finding that Legend meets the statutory requirements for obtaining certificate authority. Order 98-10-15 (October 16, 1998). The Department stated that it would consider in this proceeding the arguments about Legend's ability to carry out its service proposal, if the Department did not grant Fort Worth's motion to dismiss. *Id.* at 4-5.

Amendment of U.S. Airlines' Certificate Authority. The Department included in every U.S. airline's domestic certificate a condition barring that airline from operating Love Field service, except as permitted by the Wright Amendment. The Department recently amended that condition to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998). As explained there, the certificate amendments were a ministerial action that did not require a decision on other issues, such as those raised in the pending lawsuits. *Id.* at 6.

FAA Enforcement Proceeding. The FAA has begun an enforcement proceeding against an airport that imposed operating restrictions analogous to the ones that Fort Worth wishes to impose on Love Field. The FAA has issued a Director's Determination, a preliminary decision, holding that the Arapahoe County Public Airport Authority, the owner of Centennial Airport, an airport located near Denver, violated its obligations under federal law by denying access to Centennial Express Airlines, a scheduled airline, when the airport allows charter

airlines operating similar equipment to use the airport. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority*, FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (issued August 21, 1998) ("Centennial Decision") (exhibit 17 in the DFW Board's comments is a copy of this FAA decision). The FAA held, among other things, that the airport's desire to have scheduled airlines use Denver International Airport was not a legitimate reason for blocking Centennial Express from using Centennial Airport. Centennial Decision at 24, 25. After the Director's Determination was issued, an FAA hearing officer held a hearing in the case as provided by 14 C.F.R. Part 16.

## THE DEPARTMENT'S INSTITUTION OF THIS PROCEEDING

The dispute over new service at Love Field led to the institution of this proceeding. Several of the parties in the Texas litigation asked the Department to take steps to help resolve the dispute. Fort Worth asked the Department to mediate the dispute. Dallas and Legend urged the Department to intervene in the state court proceeding, although they suggested that the Department should issue a declaratory ruling if it was unwilling to intervene in the state court proceeding. American, on the other hand, asked the Department to let the Texas courts resolve the dispute.

The Department also received letters from Senator Trent Lott, the Majority Leader of the United States Senate, and Congressman Bud Shuster, the Chairman of the Committee on Transportation and Infrastructure of the United

States House of Representatives, asking the Department to take action to assert the federal interests involved in the dispute. After the Department began this proceeding, it received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger.

As the agency primarily responsible for the administration of the relevant statutory provisions, the Department decided to issue a ruling on the federal law questions that are the principal issues underlying the litigation. The Department had taken similar action in 1985 to resolve an earlier dispute over the interpretation of the Wright Amendment. *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985). The Department therefore asked the parties for their views on the federal law issues at issue in the dispute. Order 98-8-29 (August 25, 1998). The Department stated that it would rule on the following federal law issues raised by the Love Field dispute; one issue was added by Order 98-9-5 (September 3, 1998):

> (1) Whether the statutory preemption provision, 49 U.S.C. 41713(b), prohibits one airport owner by contract with a second airport owner from maintaining a commitment by the latter to limit airport operations at its own airport, and whether such a restriction falls within the proprietary powers exception in 49 U.S.C. 41713(b)(3);
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> (2) Whether the Wright and Shelby Amendments preempt the City of Dallas' ability to restrict service at Love Field except as consistent with the terms of those amendments;
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> (3) Whether the Shelby Amendment authorizes carriers using jet aircraft with a passenger

capacity of 56 seats or less to engage in longhaul service from Love Field to any city in the United States;

(4) Whether a major carrier may bind itself through its use agreements with the DFW Airport Board that it will not exercise the authority granted by its certificate to operate flights from Love Field that are consistent with the Wright and Shelby Amendments; and

(5) Whether the Wright and Shelby Amendments allow an airline to offer through service from Love Field to points outside the seven-state area within which unrestricted service is permitted, if the airline uses a city within the seven-state area as a connecting point and uses aircraft with no more than 56 seats for its flights between Love Field and the connecting point.

The Department stated that it intended to issue a ruling so that the courts could consider its interpretation. Order 98-8-29 at 5.[3]

## THE PARTIES' COMMENTS

### Parties Opposing Expanded Service

In their pleadings Fort Worth, American, and the DFW Board (collectively "the Fort Worth parties") argue that federal law allows Dallas as Love Field's proprietor to restrict service at that airport and that the Wright and Shelby Amendments do not preempt Dallas' ability to limit the scope of Love Field service, since the two

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[3] We later granted in part the requests by Fort Worth, American, and the DFW Board for more time for filing comments. Order 98-9-5 at 4.

amendments were intended only to limit the Department's authority to authorize service, not the cities' authority to restrict service authorized by the two statutes. These parties assert that Dallas is therefore obligated by the Bond Ordinance to bar airlines from operating the services authorized by the Shelby Amendment. Fort Worth and the DFW Board contend that the exception for aircraft with a passenger capacity of 56 passengers or less does not allow the operation of long-haul service with regional jets or reconfigured large aircraft and that the DFW Board may enforce its use agreement to bar an airline from operating interstate service at Love Field.[4] While American believes that the Bond Ordinance is enforceable against Dallas, American contends that a decision by the Department to the contrary would compel the Department to hold that the DFW Board may not block airlines from operating interstate service from Love Field.

Fort Worth, American, and the DFW Board additionally have made various procedural requests, such as their

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[4] The DFW Board submitted hundreds of pages of the transcript from the state court's proceedings but specifically cited none of the testimony in support of its case. The DFW Board should have cited any specific testimony that it wished the Department to consider. The courts have held in similar cases that a party must identify the material supporting its case when it files lengthy evidentiary pleadings in an administrative proceeding. *Northside Sanitary Landfill, Inc., v. Thomas*, 849 F.2d 1516, 1519-1520 (D.C. Cir. 1997); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-280 (D.C. Cir. 1997).

request for a dismissal of this proceeding. The Department is addressing these procedural issues in its companion order.

The Love Field Citizens Action Committee asserts that no decision may be issued without the preparation of an environmental impact analysis.

The Allied Pilots Association, which represents American's pilots, contends that we must consider safety issues before allowing more service at Love Field.

Parties Supporting Expanded Service

Dallas, Southwest, Continental Express, and Legend (collectively "the Dallas parties") contend that the Department may and should issue a decision on the federal law issues. These parties assert that Dallas may not bar airlines from operating the Love Field services authorized by the Wright and Shelby Amendments.

Dallas states that it is committed to maintaining DFW as the area's primary airport but that it needs a clear and final decision on its ability, if any, to restrict Love Field service. Dallas agrees with the DFW Board that it may enforce the provision in the DFW use agreements requiring airlines to comply with the Bond Ordinance's restrictions on using other airports in the Dallas-Fort Worth area.

Continental Express argues that it may operate longhaul service with aircraft with a passenger capacity of 56 passengers or less and that the DFW Board may not enforce the use agreements' prohibition against operating interstate service at other area airports.

Southwest takes no position on the scope of the exception for aircraft with a passenger capacity of 56 passengers or less, except that Southwest contends that an airline may not offer through service to points outside the Love Field service area, whether its Love Field flights use aircraft with a passenger capacity of 56 passengers or less. Southwest also thinks that the DFW Board may enforce an airline's commitment not to use another airport for interstate service.

The Southwest Airlines Pilots Association argues that expanded service at Love Field will create no safety problems.

Legend asks the Department to act quickly, since the ongoing litigation over the Shelby Amendment is injuring Legend's ability to compete with American and other airlines in Dallas-Fort Worth area markets. Legend agrees with Continental Express that the Shelby Amendment authorizes longhaul service with jet aircraft that meet the 56-passenger capacity requirement. Legend takes no position on whether the DFW use agreement is enforceable.

Other Parties

Two airport trade associations, the Airports Council International-North America and the American Association of Airport Executives ("the airport trade associations"), are concerned about preserving the ability of airport proprietors to reasonably allocate services between different airports and ask the Department to follow a case-by-case approach in determining whether

such an allocation is lawful. The airport trade associations also contend that airlines may waive rights by contract.

The City and County of San Francisco supports the airport trade associations' position.

The Greater Orlando Aviation Authority asserts that airlines may waive their rights by contract; if the Department disagrees, it should not make that ruling retroactive.

Delta asks that the decision be limited to the specific facts of Love Field and avoid any broader rulings, since the resolution of preemption questions depends greatly on the factual circumstances.

## INTRODUCTION TO OUR DECISION

### Summary of Decision

As explained in the companion order, the Department has determined, given its responsibility to administer the federal statutes relevant to the Love Field dispute, that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth's request to dismiss this proceeding, as discussed in the companion order ruling on the procedural issues raised in this proceeding.

In the light of the federal preemption of the regulation of airline routes by state and local governments, Dallas' proprietary powers as Love Field's owner do not allow it to impose the type of restrictions on Love Field service sought by Fort Worth, the DFW Board, and American. While an airport owner may impose limits on certain

types of service operated at an airport, those limits must be reasonable, non-discriminatory, and necessary to carry out a legitimate goal, such as limiting noise or congestion. The Fort Worth parties have not shown that the restrictions they seek would meet this standard.

In addition, the Wright and Shelby Amendments preempt any agreement between the cities restricting service at Love Field. Congress intended to allow airlines to operate the interstate services authorized by those statutes, despite the cities' wish to eliminate interstate service at Love Field. Congress made that decision under its authority to regulate interstate commerce, which authorizes it to regulate airline and airport operations.

Both the Wright and Shelby Amendments allow any airline to operate longhaul service with aircraft meeting the maximum 56-seat capacity standard, whether the airline may be deemed a commuter airline and whether the aircraft is a jet.

The DFW use agreements cannot block an airline from offering interstate service at Love Field. Like Fort Worth and Dallas, DFW has no authority to restrict an airline's use of Love Field. The Department disagrees with the DFW Board's contention that its agreements constitute an enforceable waiver by the airlines of any rights to use Love Field – insofar as the use agreements bar an airline from operating at an airport competing with DFW, the agreements are unenforceable.

Finally, the Department finds that Continental Express may offer through service to points outside the Love Field service area over Houston, if its flights from Love

Field to Houston use aircraft with a passenger capacity of 56 passengers or less.

The Department's conclusion that Dallas may not currently restrict service at Love Field to protect DFW from competition is fully consistent with the FAA's findings in its Centennial Decision. The Department has based this decision, however, on the facts of the Love Field dispute, for proprietary rights issues must be resolved case-by-case. The Department disagrees with the state court's decision on these issues, but the lack of any opinion explaining that court's analysis has prevented the Department from taking the court's rationale into account.

Before addressing the federal law issues set forth in the orders instituting this proceeding, the Department will discuss the safety and environmental issues raised by two parties.

## SAFETY AND ENVIRONMENTAL ISSUES

### The Safety of Dallas-Fort Worth Area Airline Operations

The Allied Pilots Association, the bargaining representative for American's pilots, suggests that we should defer deciding this proceeding until we have analyzed air traffic procedures for the Dallas-Fort Worth area and determined whether they should be changed. The Allied Pilots Association alleges that additional flights at Love Field will affect the risk analysis previously undertaken by the FAA.

The Southwest Pilots Association, on the other hand, contends that Love Field is one of the nation's safest airports and that allowing additional service at Love

Field will not reduce the safety of airline operations in the Dallas-Fort Worth area. They state, "We do not believe any legitimate safety issues exist, however, with respect to current or reasonably foreseeable levels of operations at Love Field or DFW."

The Department's decision interpreting the federal statutes governing Love Field and preemption will not affect safety. The FAA will maintain the safety of aircraft operations in the Dallas-Fort Worth area. As the *Love Field Study* stated, "The FAA will not permit air traffic safety to be compromised under any circumstances. Safety is ensured by FAA procedures and requirements based on air traffic control and system capacity. . . . " *Love Field Study* at 66. *See also Love Field Study*, Executive Summary at 1. Patrick V. Murphy, the Deputy Assistant Secretary for Aviation and International Affairs, similarly testified on October 21, 1997, before the Subcommittee on Transportation of the Senate Appropriations Committee, that increased Love Field service would not threaten safety, for "we concluded that safety would be maintained by FAA imposed air traffic procedures." The safety of airline operations in the Dallas-Fort Worth area is primarily affected by the total number of operations in the area, not by the number of flights using a particular airport.[5]

Moreover, the Shelby Amendment directs the FAA to monitor safety, and the conference committee report on

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[5] Under the position taken by Fort Worth and its allies, Southwest and other airlines may already add flights at Love Field within the limits set by the Wright Amendment. In fact American has begun operating fourteen daily roundtrip flights between Love Field and Austin.

the bill directed the FAA to review and report on air traffic procedures if operations at either DFW or Love Field increase by twenty-five percent or more. H.R. Rep. No. 105-313, 105th Cong., 1st Sess. (1997) at 45. Congress thus decided to authorize additional services at Love Field without first requiring a study of the possible impact on safety.

National Environmental Policy Act Issues

In its comments the Love Field Citizens Action Committee, which represents Love Field area residents dissatisfied with the noise and other environmental problems allegedly created by that airport, asserts that we may not issue a ruling in this proceeding without first preparing an environmental impact statement under the National Environmental Policy Act.

The Department finds that no environmental impact statement is necessary in this proceeding. The Department is interpreting existing statutory requirements. It is not taking discretionary action on its own that would affect the level of operations at Love Field. Congress has enacted legislation specifying what services may and may not be operated at the airport. As a result, there would be no point in preparing an environmental impact statement, as the Department explained when it amended the certificate authority of U.S. airlines to reflect the changes made by the Shelby Amendment. Order 98-7-6 (July 8, 1998) at 6-7. The courts have held that non-discretionary acts are exempt from the requirement to prepare an environmental impact statement, for the primary purpose of a statement is to assist agency decisionmaking. *See, e.g.,*

*Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990); *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508 (4th Cir. 1992); *Atlanta Coalition on Transportation Crisis v. Atlanta Regional Comm'n*, 599 F.2d 1333 (5th Cir. 1979).

In addition, the *Love Field Study* contained a detailed analysis of the likely environmental impact of additional Love Field service. The *Love Field Study* concluded that any environmental effects would be outweighed by the public's ability to obtain more service and lower fares if airlines had a greater ability to serve Love Field. *See* Order 98-10-15 at 5, n. 12.[6]

## INTRODUCTION TO THE FEDERAL STATUTORY ISSUES

The Department will now address the five legal issues on which it stated that it would issue an interpretation. As a preliminary matter, however, the Department wishes to emphasize the limited nature of its decision. Insofar as the airport proprietary rights issue is concerned, we are determining whether an airport has the power to restrict airline services in a way which is essentially the same as route regulation when there is no showing that the restrictions are needed to carry out a permissible airport

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[6] The Love Field Citizens Action Committee filed a report showing that severe traffic congestion would result if Love Field airline and general aviation operations increase from the current level of 225,000 per year to 400,000 per year. Love Field Citizens Action Committee October 9, 1998 pleading. As Legend points out, the report assumes that, if general aviation operations do not increase, Love Field airline operations will almost triple, which is highly unlikely. Legend Response to Love Field Citizens Action Committee Comments.

goal.[7] The limited scope of this decision is thus consistent with the requests by the airport trade associations, San Francisco, and Delta that the Department bear in mind that preemption and proprietary right questions are usually fact-specific and that it should avoid issuing an unnecessarily broad decision that could interfere with the legitimate needs of airports and airport operating practices.

This decision reflects their concerns. The Department recognizes that airport operators have legitimate management needs that are not preempted by federal law. The Department does not intend to undermine their ability to exercise those rights. Here the Department is concerned only with the question of whether Dallas has the authority as Love Field's owner to essentially regulate airline routes. The Department is basing its interpretation of the federal statutes on the specific circumstances of Love Field. While this interpretation of the statutory preemption and proprietary powers provisions in some respects may have wider applicability, the Department is largely

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[7] The Department is also not considering whether the Love Field restrictions sought by Fort Worth would violate the grant assurances given the FAA by Dallas in order to obtain federal grants for Love Field. The order instituting this proceeding did not ask the parties to address that issue. The prohibition against discrimination would be violated, however, if Southwest were allowed to provide services that other airlines could not. *City of Dallas, Texas v. Southwest Airlines, supra*, 371 F. Supp. at 1028-1030. In addition, the reasoning in the FAA's Centennial Airport decision suggests that restrictions of the type sought by Fort Worth would violate an airport's obligations under its grant assurances, although the FAA stated that it was not deciding the Love Field issues. Centennial Decision at 30, n. 7.

following existing law on those issues. Critical to this decision is the lack of any showing that there is a legitimate need (a need recognizable as proper by judicial and administrative interpretations of federal law) for stopping airlines from operating the Love Field services authorized by the Shelby Amendment.

This decision does not undermine the authority of earlier decisions allowing an airport proprietor to impose reasonable and non-discriminatory restrictions on the use of an airport when those restrictions are demonstrably necessary to achieve a rational goal. *See, e.g., Western Air Lines v. Port Authority of New York & New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert, denied*, 485 U.S. 1006. Indeed, in beginning this proceeding the Department stated that it would not consider whether Dallas may take other action to limit the scale of operations at Love Field to alleviate Fort Worth's concerns over the increased scope of service authorized by the Shelby Amendment. Order 98-8-29 at 4-5. The Department has no intention of taking away an airport's ability to reasonably manage its operations. In that regard, the FAA has taken enforcement action against the Arapahoe County Public Airport Authority for excluding scheduled carrier operations at Centennial for which no additional airport operating authority is required by the airport. However, the FAA would not compel the airport to apply for an airport operating certificate that would be needed for scheduled service operated with aircraft with more than thirty seats. Centennial Decision at 19.

American argues that a decision allowing more service at Love Field and thereby invalidating the Bond Ordinance's restrictions will frustrate efforts by other cities to

create regional airports, efforts which assertedly require restrictions on airline service at existing airports. American Comments at 31; American Reply at 17-19. American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport. *Cf. City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

## ISSUE ONE: THE SCOPE OF DALLAS' PROPRIETARY RIGHTS

The principal basis of the dispute over expanded Love Field service is Fort Worth's claim that Dallas has obligated itself to restrict service at that airport. Dallas' commitments to Fort Worth allegedly require Dallas to block airlines from operating the additional services authorized by the Shelby Amendment. Fort Worth bases this claim on the Bond Ordinance, which, as described above, obligated the two cities to transfer all interstate airline service from their local airports to DFW to the extent legally permissible.

American and the DFW Board support Fort Worth's claim that Dallas' commitments to Fort Worth require it to restrict Love Field service. The Dallas parties disagree. They contend that Dallas does not have the authority under federal law to restrict Love Field service as sought by Fort Worth.

As a matter of federal law, Fort Worth may enforce its contract claims against Dallas only if federal law allows Dallas as Love Field's owner to impose the kind of restrictions sought by Fort Worth. The statute defining an airport owner's authority to limit service is 49 U.S.C. 41713(b), which bars state and local governments from regulating airline routes, rates, and services, but allows airport owners to exercise their proprietary rights. As explained below, an airport owner's proprietary powers allow it to restrict airline operations only when the restrictions are reasonable, nondiscriminatory, and designed to achieve a legitimate goal. The airport owner, moreover, must show that the restrictions are both necessary and tailored to achieve a legitimate goal.

Dallas' rights as Love Field's proprietor do not allow it to bar airlines from operating the services authorized by the Shelby Amendment. The Department is here considering only one issue, whether Dallas as Love Field's owner may determine which routes may be served from its airport and by which types of equipment. The discussion of this issue begins by explaining the standard for determining whether an airport owner's regulation is within the owner's proprietary powers. The order then analyzes whether the restrictions sought by Fort Worth would be prohibited but for Dallas' proprietary rights and whether

the restrictions could be adopted under Dallas' proprietary powers. No party cited record evidence indicating that the additional Love Field operations authorized by the Shelby Amendment could threaten DFW's viability or displace DFW as the area's dominant airport.

The Statutory Provisions on Preemption and Proprietary Rights

The preemption provision, 49 U.S.C. 41713(b), including the exception for the exercise of the proprietary rights of airport owners, reads as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide transportation under this subpart.
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> . . . .
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> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

Congress enacted this provision when it deregulated the domestic airline business in 1978. Congress did so "[t]o ensure that the States would not undo federal deregulation with regulation of their own," *Morales v. Trans World Airlines*, 504 U.S. 374, 378 (1992), quoted in *American Airlines v. Wolens*, 513 U.S. 219, 222 (1995). As part of

deregulation, Congress eliminated the Board's power to determine which routes could be operated by an airline. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Congress had determined that the public would benefit if each airline was able to choose which markets it would serve in response to market demands. Allowing state and local governments to regulate routes would frustrate Congress' policy.

The Scope of the Proprietary Rights of Airport Owners

A restriction imposed by an airport proprietor must be "reasonable, nonarbitrary, and non-discriminatory" and "avoid even the appearance of irrational or arbitrary action." *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998). The Department's own policy statement, originally adopted by the Board, similarly states that an airport owner's conduct is not preempted as an exercise of its proprietary powers "when such exercise is reasonable, nondiscriminatory, nonburdensome to interstate commerce, and designed to accomplish a legitimate State objective in a manner that does not conflict with the provisions and policies [of the aviation provisions of Title 49]." 14 C.F.R. 399.110(f). *See also* Centennial Decision at 28, citing *British Airways Board v. Port Authority of New York*, 558 F.2d 75 (2d Cir. 1977).

The principal example for airport owners' exercise of their proprietary powers is their need to restrict operations in order to limit their liability for noise. *Western Air*

*Lines v. Port Authority, supra,* 658 F. Supp. at 956. However, court decisions have allowed airport owners to restrict service for reasons other than limiting noise, as explained below.[8]

In the leading case, *Western Air Lines v. Port Authority,* a district court upheld a perimeter rule adopted by the Port Authority of New York and New Jersey for LaGuardia in a decision affirmed by the Second Circuit. The Port Authority adopted the rule to force airlines to use JFK, another Port Authority airport, for all nonstop longhaul flights. The perimeter rule restricted nonstop flights at La Guardia to a maximum distance of 1500 miles (with a grandfather exception for Denver flights).

While the district court held that airport owners could regulate subjects other than noise, such as congestion, 658 F. Supp. at 956-957, the court stated the proprietor's power was limited to "the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest." 658 F. Supp. at 958. The district court concluded that the perimeter rule met this standard

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[8] The courts have long held that a state or local government may not restrict airport operations on noise grounds unless that government is the airport's proprietor. *City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306 (9th Cir. 1981), *cert. denied,* 455 U.S. 1000. Fort Worth is not Love Field's proprietor. It contends, however, that Dallas obligated itself to restrict service at Love Field in order to carry out the cities' joint goal of establishing DFW as the area's dominant airport and that it has the right to enforce Dallas' obligations. This order assumes that Dallas' agreement with Fort Worth does give the latter the right to enforce Dallas' contract obligations, to the extent they are consistent with federal law.

because Port Authority studies had demonstrated its need for the rule. La Guardia was operating at or near the limits of its capacity in certain areas, which had already created delays and congestion. The Port Authority believed that allowing longer flights (and thus more leisure traffic) at LaGuardia would increase delays and congestion. The district court thus upheld the rule on the ground that it was reasonably designed to alleviate demonstrated problems at LaGuardia by shifting longhaul traffic to JFK and was therefore a legitimate exercise of the proprietary powers of the operator of a multi-airport system. 658 F. Supp. at 959-960.[9]

On appeal the Second Circuit essentially adopted the district court's analysis as its own. The Second Circuit stated, " . . . we agree with (the district court's] conclusion that the rule, at least when enacted by a multi-airport proprietor such as the Authority, falls within the proprietary power of airport operators exempted from preemption [by the statute]." 817 F.2d at 226.[10]

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[9] An earlier district court decision, *Aircraft Owners & Operators Ass'n v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969), is consistent with *Western Air Lines*. That decision upheld peak hour fees imposed by the Port Authority on general aviation to reduce demonstrated congestion problems.

[10] When Delta, which had acquired Western, asked the Supreme Court for certiorari, the United States filed a brief opposing Delta's petition; exhibit 9 to American's comments is a copy of this brief. The brief stated that an airport's proprietary powers included the power to take reasonable steps to prevent congestion and that, "[i]n a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion." United States Brief at 6.

The Fifth Circuit also upheld a perimeter rule adopted by the FAA for Washington National Airport (now Ronald Reagan Washington National Airport). *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Court held that the FAA's rule barring longhaul service at National was a rational means of encouraging airlines to move flights to the then little-used facilities at Dulles International Airport. As the court pointed out, since the perimeter rule had been adopted by the FAA, a federal agency, the decision did not involve an interpretation of the statutory preemption provision. 679 F.2d at 1194. The Court stated, however, that the FAA's position as the airports' proprietor gave it the authority to adopt the perimeter rule. 679 F.2d at 1196.[11] The Fifth Circuit observed, "Already empty for much of the day with a [perimeter] rule, Dulles might, if we invalidate the perimeter, cease to exist." 679 F.2d at 1191. The Court also relied on evidence that National Airport was plagued with problems such as "overcrowded parking lots and aircraft aprons, insufficient counterspace, traffic congestion, too little baggage claim area, [and] harsh environmental effects on the airport's neighbors." 670 F.2d at 1193.

On the other hand, in *Pacific Southwest Airlines v. County of Orange*, No. CV 81-3248 (C.D. Calif. Nov. 30, 1981), a district court held in an unpublished decision that the airport proprietor, which operated only one airport,

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[11] The FAA's preliminary decision in the Centennial Airport case stated, however, that the Fifth Circuit decision does not provide useful guidance for determining the scope of the proprietary rights of a local or state government acting as an airport owner. Centennial Decision at 30, n. 8.

could not impose a perimeter rule. The Fifth Circuit reasoned in *City of Houston* that this result was correct, because federal law did not allow the proprietor of a single airport to impose a perimeter rule. 679 F.2d at 1194.

The Second Circuit recently held that New York City as the proprietor of a Manhattan heliport could impose restrictions on helicopter operations there in order to reduce noise but could not regulate helicopter flight paths. *National Helicopter Corp. v. City of New York*, 137 F.3d 81 (2nd Cir. 1998). The Court, moreover, construed its earlier decisions as allowing an airport proprietor to impose restrictions only in order to address noise and other environmental problems. 137 F.3d at 88.[12]

In sum, the courts have allowed airports to impose restrictions on airline operations but have required such restrictions to be justified by proof that the restrictions were necessary to carry out a legitimate airport goal. No court has held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition or that a proprietor's rights include the right to limit competition between airports operated by different proprietors.

The Board and FAA have similarly interpreted the scope of an airport proprietor's rights. When the Board granted Southwest's application for Love Field-New Orleans authority, the Board summarily rejected the argument by the Dallas/Fort Worth Parties and American that Dallas'

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[12] The city had not received federal funds for the heliport and therefore was not subject to grant restrictions.

proprietary rights allowed it to block Southwest's service. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979). The Board stated that the airport proprietary rights provision was not intended to give airport operators "veto power over Board decisions." At that time the Board intended to address the proprietary rights issue in detail in another Love Field proceeding and so discussed the issues only briefly in the order in the first proceeding. 83 CAB at 651-652. The Board, however, never issued a final decision in the second proceeding due to the Wright Amendment's enactment; this statement in the Southwest case appears to be its only ruling on the extent of Dallas' rights as a proprietor. Nonetheless, the Board's language, while curt, clearly held that Dallas could not use its proprietary powers to bar an airline from operating a route at Love Field.

More recently, the FAA Director's Determination concluded that the Arapahoe County Public Airport Authority had violated the preemption provision, 49 U.S.C. 41713, as well as other federal laws, by refusing to allow Centennial Express to operate scheduled service at Centennial Airport when other carriers were allowed to operate non-scheduled services at that airport with similar equipment. The FAA determined that the airport operator had thereby violated the preemption provision. The FAA reasoned that the airport authority's ban on scheduled service at Centennial Airport was a form of route regulation prohibited by the preemption provision: "[The airport authority's] unilateral ban on scheduled service also represents a regulation of air carrier routes, because the effect of the ban is to prohibit regular operations over any

route involving the Centennial Airport." Centennial Decision at 29. As the FAA noted, "[T]his unilateral ban on scheduled service creates an inherent conflict with Federal law, which permits an air carrier holding authority to provide scheduled passenger service to provide that service to any airport in the United States." *Ibid.* The ban on scheduled service at Centennial Airport was not a permissible use of the airport authority's proprietary powers, since the authority had not provided an adequate justification for the ban. Centennial Decision at 30-31.

The FAA declared, moreover, that "[p]otential economic harm to another airport would never justify an access restriction under the grant assurance that requires Centennial Airport to be accessible to all categories of aeronautical users on reasonable terms, except possibly in the limited circumstances of a single operator of a multiple airport system . . . . " Centennial Decision at 25.[13]

Finally, the Department held that the Massachusetts Port Authority violated the statutory preemption provision, among other provisions, by adopting a fee structure at Boston's Logan International Airport that was unreasonable. *Investigation into Massport's Landing Fees,* FAA Docket 13-88-2 (December 22, 1988), Opinion at 11, a

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[13] The FAA issued its preliminary determination after the Colorado Supreme Court held that the airport's conduct was lawful. *Arapahoe County Public Airport Authority v. Centennial Express Airlines,* 956 P.2d 587 (Colo. 1998). The Colorado court, however, recognized that its reasoning would not authorize Dallas to restrict service at Love Field, for the court pointed out that Centennial Airport, unlike Love Field, was attempting to bar a type of airline operation (scheduled service) that had never existed at that airport. 956 P.2d at 596, n. 12.

decision affirmed by the First Circuit in *New England Legal Foundation v. Massachusetts Port Authority, supra*. The Department noted, among other things, that Massport had designed the fees to impose unjustified additional costs on smaller aircraft to discourage them from using Logan. As such, Massport's imposition of the fees did not constitute a valid exercise of its rights as an airport proprietor, Opinion at 9:

> [To raise fees] during times when there is no shortage of runway capacity penalizes smaller aircraft users when they are not imposing congestion-related costs on other users. This action by Massport, which unreasonably regulates and manages the type and frequency of access to the airport by air traffic, exceeds its authority as an airport proprietor and intrudes into areas that have been federally preempted.

The Nature and Purpose of the Restrictions Sought by Fort Worth

The question then is whether the restrictions sought by Fort Worth satisfy the standard for a valid airport restriction on airline services, that is, whether those restrictions would be reasonable, non-discriminatory, and necessary for achieving a legitimate goal.

Fort Worth seeks to prohibit all service with large aircraft between Love Field and points outside the Love Field service area created by the Wright Amendment (that is, Texas and the four states bordering on Texas). Those restrictions are equivalent to route regulation. In the initial Southwest litigation, both the district court and the Fifth Circuit observed that Dallas' decision to prohibit Southwest from operating scheduled service at Love

Field constituted route regulation. *City of Dallas, supra,* 494 F.2d at 777; 371 F. Supp. at 1024-1025. Section 9.5A of the Bond Ordinance, moreover, gives the DFW Board the power to waive the restriction against using another area airport for interstate service on the basis of an overriding public need for decentralized interstate airline services. In other words, the DFW Board would determine whether public demands justify new airline service at other airports, a determination exactly like the kind of route decisions made by the Board before deregulation, when the Board sometimes specified the airport that must be used for a service.[14] Such action by the DFW Board would be an attempt to undo federal deregulation by imposing its own regulation.

Fort Worth's demands may also frustrate airline plans to develop a specific type of service. For example, as the district court pointed out in the initial Southwest litigation, Dallas' efforts to block Southwest from using Love Field amounted to service regulation, since a short-haul airline like Southwest was necessarily dependent on using a close-in airport to attract passengers. *City of Dallas, supra,* 371 F. Supp. at 1031-1032.

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[14] The Department has recognized that different airports in a metropolitan area can be separate markets, so that service to one airport does not necessarily meet the needs of the market at an alternative airport. The Department therefore granted slot exemptions for low-fare airlines at Chicago's O'Hare International Airport and New York's LaGuardia Airport on the ground that the airport-to-airport routes at issue constituted separate markets justifying slot awards, even though comparable service existed at Chicago's Midway Airport and other New York City airports. *See, e.g.,* Orders 98-4-21 (April 21, 1998) at 13-14 and 98-4-22 (April 21, 1998) at 18-19.

Unless authorized by the proprietary rights exception for airport owners, Fort Worth's demands are plainly inconsistent with the statutory preemption provision. Congress amended our governing statute to end all regulatory authority to determine what domestic routes an airline may fly; the statute provides that our grant of domestic operating authority authorizes an airline to operate anywhere in the nation. Section 1601(a)(1)(c) of the Airline Deregulation Act of 1978, P.L. 95-504, 92 Stat. 1705 (1978), terminating section 401(e)(1) of the Federal Aviation Act, then codified as 49 U.S.C. 1371(e)(1). Fort Worth wishes to deny airlines the ability to choose which Dallas-Fort Worth routes they will serve through Love Field, even when the Shelby Amendment would allow service on the routes.

Dallas would clearly violate the preemption provision by imposing the restrictions on Love Field service sought by Fort Worth, unless Dallas' proprietary rights allow it to limit service in that manner.

Dallas' Ability as the Airport's Proprietor to Restrict Love Field Service

Applying the principles established by the judicial and agency decisions discussed above, the Department concludes that Dallas' rights as Love Field's owner do not allow it to restrict Love Field service as sought by Fort Worth. As shown, these decisions demonstrate that an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate

airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field service meet this standard.

First, Fort Worth is not trying to limit the environmental impact of increased service at Love Field (nor could it, since the airport is not located in Fort Worth). Fort Worth instead seeks to impose limits on Love Field service in order to protect the competitive position of DFW. *See, e.g.*, Fort Worth's Third Amended Petition, *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, at 16-18; exhibit 16 to American's Comments is a copy of Fort Worth's petition.

Neither the courts, the Board, nor this Department or any element of this Department have stated that a local government may impose restrictions at its own airport or a neighboring airport in order to limit competition for another airport preferred by that government. Such restrictions would be contrary to the very essence of deregulation, which is intended to promote competition. Fort Worth seeks to restrict Love Field service in order to avoid the competition inherent in a deregulated industry.

The closest analogies to the type of restrictions sought by Fort Worth are the National Airport and LaGuardia perimeter rules. When the courts upheld those rules in *Western Air Lines* and *City of Houston*, they did so on the ground that the airport owner had shown that the rules were necessary to achieve legitimate goals of the owner – the prevention of congestion and delays. The Fifth Circuit additionally relied on evidence showing that the lack of a perimeter rule could force the FAA to close Dulles. Here, in contrast, Fort Worth seeks to restrict service at Love Field only in order to reduce competition for DFW, as

shown by Fort Worth's complaint in the state court (the Third Amended Petition cited above) and has neither claimed nor shown that additional Love Field service would make DFW unviable. The goal of reducing competition for one airport cannot justify imposing restrictions on a second airport, when the goal is merely to prevent some service from being diverted to the second airport and to increase revenues at the first airport.

In addition, even if Dallas could restrict Love Field service to protect DFW's revenues, the restrictions sought by Fort Worth would not be a rational means of achieving that goal. Any restrictions imposed by an airport proprietor on airline service must be reasonably necessary to carry out a legitimate goal and be nonarbitrary and nondiscriminatory.

The restrictions sought by Fort Worth do not meet that standard. The city seeks, for example, to prohibit all large aircraft service to service to points outside Texas and the four states bordering on Texas (the Love Field service area established by the Wright Amendment) – nonstop flights, one-stop flights, through service, and interline service. Its proposed restrictions would create such anomalous results as allowing unrestricted service with large aircraft to cities such as Albuquerque and New Orleans, while prohibiting nonstop, through, and interline service to cities such as St. Louis and Birmingham. In contrast, the perimeter rules upheld in *Western Air Lines* and *City of Houston* barred only nonstop flights – the rules allowed stopping flights, through service, and interline service. Fort Worth has not justified its proposed restrictions on service to points outside the Love Field service area created by the Wright Amendment. Similarly,

Fort Worth has provided no justification for allowing unrestricted service with aircraft with a passenger capacity of 56 passengers or less while imposing severe restrictions on service operated with larger aircraft. Fort Worth has presented no rational connection between those specific restrictions and Fort Worth's desire to protect DFW, and no showing that the specific restrictions are reasonably necessary to achieve Fort Worth's goals.

While the restrictions sought by Fort Worth are largely the restrictions imposed by the Wright Amendment, that fact cannot validate the cities' adoption of those restrictions.[15] Congress has wide latitude in carrying out its powers to regulate interstate commerce. A state or local government, in contrast, may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary or discriminatory, and are reasonable. *See, e.g., National Helicopter Corp., supra,* 137 F.3d at 89; *British Airways Board v. Port Authority of New York & New Jersey,* 564 F.2d 1002, 1011 (2nd Cir. 1977).

The Fort Worth parties, citing *Western Air Lines* and *City of Houston,* essentially assume that the courts will approve almost any airport perimeter rule, for those parties have made no effort to show that the Bond Ordinance's restrictions are currently needed. That assumption is erroneous. The courts have upheld perimeter rules when the airport owner demonstrated that the rule was

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[15] As explained below, the Wright Amendment's commuter aircraft exemption allows longhaul Love Field service with regional jets, notwithstanding Fort Worth's claims to the contrary.

needed to alleviate congestion and environmental problems (or, in the case of National, in part to keep the airport owner from having to close its other airport).

Nothing in the plain language of the statute supports Fort Worth's position that Dallas' proprietary rights would allow Dallas to block services authorized by the Wright and Shelby Amendments. While the Fort Worth parties attempt to rely on the Wright Amendment's conference committee report, the report does not support their position. The report stated, "The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively, apply to the authority to serve Love Field on interstate flights authorized by the amendment." H.R. Rep. No. 96-716 at 26. Fort Worth and its supporters focus on the report's statement that the statute preserved Dallas' proprietary powers and ignore the statement that Dallas remained subject to the statutory preemption provision. The report clearly states that Dallas must comply with the statutory preemption provision. And, as shown, Dallas' proprietary rights did not allow it to regulate service at Love Field. Fort Worth's position would have permitted Dallas to override the Wright Amendment by declaring that any airport proprietor has the right to ignore a Congressional enactment.

Fort Worth additionally cites a 1980 House committee report that stated that the committee believed that an airport could deny access to an airline (or deny additional facilities to an incumbent airline) when another airport in the metropolitan area was capable of providing adequate facilities for the airlines. Fort Worth Comments at 25, citing H.R. Rep. No. 96-887, 96th Cong., 2d Sess.

(1980), part 2 at 15-16. The committee's statement is contrary to judicial and agency decisions on the scope of an airport owner's proprietary rights. The committee, moreover, was stating its view of the existing law, not the purpose of new legislation. As such, its statement is not persuasive authority. *See, e.g., Ohio Public Employees Retirement System v. Betts.* 492 U.S. 158, 167-168 (1989).

The Department's conclusion that Dallas may not regulate Love Field service as demanded by Fort Worth in no way means that airport owners may not use their proprietary powers for legitimate purposes. However, as to airport restrictions that would otherwise violate the statutory preemption provision, the courts have stated that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." *Western Air Lines v. Port Authority of New York and New Jersey,* 658 F. Supp. 952, 955 (S.D.N.Y. 1986), *aff'd,* 817 F.2d 222 (2nd Cir. 1987), quoting *British Airways Board, supra,* 564 F.2d at 1010.

The Fort Worth parties have made no effort to show that barring airlines from operating the services authorized by the Shelby Amendment is now necessary to carry out a permissible goal for an airport proprietor. To the extent that they argue that the restrictions are reasonable, they base their claims on the validity of the cities' original agreement, made thirty years ago. They also construe the Fifth Circuit's decision in *City of Houston* as authorizing Dallas to impose additional restrictions on Love Field service beyond those imposed by federal statute to ensure DFW's role as the area's principal airport, even though the Shelby Amendment has only modestly expanded the types of service already allowed by the Wright Amendment. Neither theory is persuasive, as discussed next.

DFW's Viability

Dallas' proprietary rights arguably would it allow to restrict service if necessary to protect the viability of DFW. However, the Wright and Shelby Amendments currently impose significant restrictions on the airlines' use of Love Field. The Fort Worth parties have cited no evidence showing that the additional Love Field services authorized by the Shelby Amendment would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport.[16] The Dallas parties, on the other hand, have presented evidence and reasoning demonstrating that no significant harm to DFW is likely.[17]

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[16] The Department is addressing the proprietary rights issue in terms of the Love Field dispute, which is how the parties presented their arguments. American wrongly asserts that the Department framed this issue as an abstract issue without reference to the particular facts of Love Field. American Comments at 3-5, 12. The Department stated that it intended to consider the federal law issues in an effort to help resolve the Love Field dispute. Order 98-8-29 at 4-5. It did not intend to establish a national policy applicable to all airport situations rather than just Love Field. The parties' comments, including American's comments, demonstrate the parties' expectation that the Department would decide whether Dallas' proprietary rights allowed it to restrict Love Field service as demanded by Fort Worth. Their comments present in detail their factual and legal arguments on this issue. *See, e.g.*, American Comments at 12-30. In addition, the airport trade associations and Delta urge the Department to limit its ruling on the first issue to the specific facts of Love Field. ACI/AAAE Comments at 6-7; Delta Reply at 1-2.

[17] Although some parties have suggested that allowing additional Love Field service could undermine the rights of DFW's bondholders, no party has argued that additional Love

First, DFW has been very successful, and its success is a tribute to the cities' willingness to work together to create that airport. The Wright and Shelby Amendments, moreover, continue to impose substantial restrictions on Love Field service. An airline operating large aircraft may not operate nonstop or stopping flights from Love Field to any point outside the eight-state Love Field service area and may not offer through service or interline service from Love Field to any such point. While airlines may provide longhaul service with aircraft with a passenger capacity of 56 passengers or less, using aircraft with a small number of seats for longhaul markets is usually less efficient. Legend Reply at 15. Indeed, Southwest for a number of years has been the only airline willing to operate service with large aircraft at Love Field subject to the restrictions imposed by the Wright Amendment.

Secondly, while Southwest has greatly increased the scale of its operations at Love Field since it began operations, that has not kept DFW from growing. DFW's passenger enplanements have risen from 11.3 million in 1979 to 60.5 million in 1997. While DFW had 60.5 million enplaned passengers in 1997, Love Field had only 3.4 million. Continental Express Reply at 2.

In 1997 Southwest operated an average of 270 daily flights at Love Field. The services proposed by Legend, Continental Express, and others will increase that number by ninety flights per day; even so, that level of service will be a small fraction of the 2,800 flights operated each

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Field service would actually injure the bondholders' interests. No representative of the bondholders has filed comments in this proceeding.

day at DFW. Legend Comments at 47, 63. Even if other airlines add interstate flights, Love Field cannot overtake DFW as the area's primary airport. In addition to the statutory restrictions, Love Field has a relatively small number of available gates. *Love Field Study* at 51-54.[18]

Moreover, the court decisions on the scope of airport proprietary rights, especially the perimeter rule cases, insist that airports imposing such restrictions must demonstrate a need for the restrictions. The pleadings filed by the Dallas parties pointed out the importance of a showing of need as an essential condition to an affirmance of an airport perimeter rule. *See, e.g.*, Dallas Comments at 23-26; Legend Comments at 89-90. Notwithstanding their arguments, and the courts' express reliance on such a showing, none of the parties seeking restrictions on Love Field service made any effort to show that current conditions require a prohibition against the operation of the services authorized by the Shelby Amendment.

Equity and Estoppel

Some of the parties opposing additional Love Field service contend that allowing more service at Love Field

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[18] Other metropolitan areas have multiple airports and still have a dominant airport comparable to DFW, even though service at the secondary airports is not legally restricted. For example, O'Hare is the dominant airport at Chicago, Bush Intercontinental at Houston, Los Angeles International at Los Angeles, and San Francisco International in the San Francisco Bay Area. The secondary airports comparable to Love Field are Midway at Chicago; Hobby at Houston; Hollywood-Burbank, Ontario, and Long Beach in Los Angeles County; and Oakland and San Jose in the Bay Area.

now would unfairly reverse the cities' expectations that all interstate service would be operated from DFW and injure those parties who allegedly relied on the support of the Civil Aeronautics Board and other federal agencies for the cities' original plan to replace the local airports with DFW. *See, e.g.*, Fort Worth Comments at 4-7. They allege in particular that the two cities agreed to build DFW and close their local airports to airline service largely as a result of the Board's pressure. The DFW Board sums up its position with the phrase, "a deal is a deal." DFW Comments at 3.[19]

Any agreement between the cities on airport operations was always subject to federal statutory law, as recognized by the Bond Ordinance's terms. The DFW Board's estoppel argument misconstrues the two cities' original agreement to move all interstate service to DFW. The Bond Ordinance only required the two cities to end all interstate service at their local airports to the extent "legally permissible." When the U.S. district court initially held that Southwest was entitled to use Love Field, the court reasoned that the Bond Ordinance by its terms did not prohibit all airline service .at Love Field. *City of Dallas, supra*, 371 F. Supp. at 1019, 1035.

Even without the "legally permissible" qualification in the Bond Ordinance, the cities knew that the operation of

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[19] Fort Worth, however, has developed Alliance Airport as a major cargo airport. According to Legend, Fort Worth's development of Alliance is inconsistent with the Bond Ordinance, which requires all interstate scheduled service (both passenger and cargo) to be operated at DFW, to the extent legally permissible. Legend Comments at 42-43.

DFW and each city's local airports would be subject to regulation by Congress and executive branch agencies. The cities could reasonably expect that regulatory policies would change over the years as the airline business itself changed.

The cities, after all, adopted the Bond Ordinance thirty years ago. Since then the airline industry has been transformed. Congress deregulated the airline industry and took away the Civil Aeronautics Board's authority to determine which airline should fly which route. Now each airline can determine what routes it wants to fly and what kind of service it should offer. Southwest's success is the prime example of the benefits created by deregulation, for Southwest never would have developed into a major airline under the regulatory scheme in place in the 1960's. Moreover, airline traffic in the Dallas-Fort Worth area has quintupled. Continental Express Reply at 2.

In carrying out its authority to regulate interstate commerce, Congress can and does take into consideration changes in the airline industry. Airline services are uniquely subject to federal control. It is Congress that authorized the deregulation of airlines in the expectation that market forces would then drive airline decisions on what services to provide. Nevertheless, Congress has always had the authority to determine what airline services may or may not be operated at any airport. If Congress determines that the restrictions on Love Field should be liberalized, as it did in 1997, the Department is obligated to comply with that determination. In any event, nothing indicates that the Shelby Amendment could significantly weaken DFW's position as the Dallas-

Fort Worth area's principal airport. Thus, the amendment will not frustrate the cities' original goal underlying their creation of DFW as the regional airport. Our interpretation of Congress' action accordingly cannot undermine the two cities' plan to maintain DFW as the area's principal airport.

Fort Worth's Contract and Takings Claims

Fort Worth makes a related claim, that a decision allowing the services authorized by the Shelby Amendment would assertedly violate its Constitutional rights by taking Fort Worth's property without compensation and by impairing its rights under its agreement with Dallas. Fort Worth Comments at 21-23.

Here the Department is merely interpreting statutes that Congress has already enacted, not creating new obligations and mandates on its own. Thus the question is whether Congress has violated Fort Worth's rights. Any question about Congress' authority to determine the scope of permissible service at Love Field has been dispelled twice by the federal courts. *Cramer v. Skinner, supra; State of Kansas v. United States, supra.* Fort Worth never asserted that the Wright Amendment violated its Constitutional rights, even though that statute authorized much more interstate service than is authorized by the Shelby Amendment. We think that Congress' authorization of additional Love Field service under its power to regulate interstate commerce has not injured Fort Worth's Constitutional rights.

If Fort Worth's Takings Clause argument were read as an argument that Congress' regulation of airport operations

has interferred with Fort Worth's ability to gain the maximum advantage from its partial ownership of DFW, the claims would have no merit. Congress frequently imposes regulations on the use of property that may diminish its value. Unless the regulation in question causes a substantial reduction in the value of the property and interferes with the owner's legitimate investment expectations, there is no taking. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-225 (1986); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602 643-646 (1993); *Andrus v. Allard*, 444 U.S. 51 (1979).[20]

Furthermore, Congress may license firms to engage in interstate transportation even if that overrides exclusive rights created by state or local law. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1 (1824). The Constitution also does not protect a firm from new competition later authorized by a state or federal government, unless the first firm had an express guarantee that no new competition would be created. *Charles River Bridge v. Warren River Bridge*, 36 U.S. 420, 551-553 (1837). As a result, even if the Shelby Amendment significantly reduces DFW's future revenues, Congress' enactment of that statute could not violate Fort Worth's Constitutional rights.

In any event, Fort Worth's contention that a statutory interpretation allowing more service at Love Field will violate its contract rights has no merit. First, the Bond Ordinance itself requires the cities to move interstate service to DFW only to the extent doing so is legally

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[20] As Dallas points out, Dallas owns Love Field, and the federal statutes, insofar as they restrict the use of any property, restrict the use of Love Field. Dallas Reply at 10-11.

permissible. In the first round of the Southwest litigation, the district court, as shown, held that the Bond Ordinance means what it says. *City, of Dallas, supra,* 371 F. Supp. at 1019, 1035. Dallas has stated that it never agreed to violate federal law by signing the Bond Ordinance. Dallas Reply at 10. Secondly, parties may not enforce contracts that are contrary to federal law, and they may not avoid federal requirements by characterizing their conduct as contractual in nature. *See, e.g., City and County of San Francisco v. FAA,* 942 F.2d 1391, 1399 (9th Cir. 1991). And Congress and federal agencies may adopt policies invalidating existing contracts between private parties. *See, e.g., See* [sic] *Republic Airlines v. United Air Lines,* 796 F.2d 526 (D.C. Cir. 1986).

Dallas' Status as an Airport Owner

The two court decisions upholding a perimeter rule – *City of Houston* and *Western Air Lines* – did so on the ground that the rule was a reasonable and necessary means for an airport proprietor to allocate airline operations between two or more airports controlled by that proprietor. As discussed, if Dallas were viewed as controlling Love Field and DFW, it could not impose restrictions of the kind sought by Fort Worth without a showing that they are necessary to achieve legitimate airport goals.

While the Fort Worth parties believe that Dallas is the owner of a multi-airport system, given its ownership of Love Field and its majority of ownership of DFW, Dallas contends that it is not. The Department agrees with Dallas – Dallas may not be viewed as the operator of a multi-airport system for purposes of those decisions.

The Department recognizes that Dallas is deemed the owner of seven elevenths of DFW and chooses seven of the eleven members of the DFW Board. *See, e.g.*, American Comments at 13. Nonetheless, Dallas does not control DFW, as demonstrated most obviously by DFW's disagreement here and in the state court proceeding with Dallas' position on the interpretation of federal law. In addition, section 9.5B of the Bond Ordinance states that the DFW Board may only grant an airline a waiver allowing it to use a different airport for interstate service with the approval of eight of the eleven Board members. Fort Worth's representatives thus have a veto over the grant of any such waivers, and Dallas does not have the ability to allocate services between Love Field and DFW.[21]

One court held that a city may be deemed the airport's proprietor only when it has kept the power to regulate airport operations. The Court held that a city that has leased the management and operation of its airport to a private firm is no longer the proprietor for purposes of determining whether the city may regulate airport operations to reduce noise. *Pirolo v. City of Clearwater*, 711 F.2d 1006 (11th Cir. 1983). Similarly, in the Centennial Decision the FAA ruled that an airport owner may not restrict service at one airport as part of an allocation of services between airports unless the owner controls both airports: "The owner must be in a position to assure that all classes

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[21] While Dallas controls other airports, like Redbird, Dallas' ability to restrict service at Love Field would depend on whether it controls DFW, the airport to be benefited by those restrictions, not on whether it controls another airport unaffected by the restrictions, for purposes of this discussion.

of aeronautical needs can be fully accommodated within the system of airports *under the sponsor's control* and without unreasonable penalties to any class and that the restriction is fully supportable as being beneficial to overall aviation system capacity." Centennial Decision at 24 (emphasis added).

## ISSUE TWO: PREEMPTION BY THE WRIGHT AND SHELBY AMENDMENTS

In addition to considering whether Dallas may restrict Love Field service under its rights as the airport's proprietor under 49 U.S.C. 41713, the Department stated that it would consider whether Congress' enactment of the Wright and Shelby Amendments by themselves preempted Dallas' ability to restrict services authorized by those statutes. On this issue the Fort Worth parties essentially contend that the Wright and Shelby Amendments govern only the conduct of the federal government (that is, this Department and the Board) and grant no affirmative right to any airline to operate interstate service at Love Field. The Dallas parties, on the other hand, contend that the two statutes override the cities' agreement to limit service and prohibit Dallas from barring service permitted by the Wright and Shelby Amendments.

The Department finds that the Wright and Shelby Amendments preempt the cities' ability to regulate service at Love Field.

Whether a federal statute or rule preempts state and local government regulation depends on the intent of Congress. As the Supreme Court has explained, "Preemption may be express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's

language or implicitly contained in its structure and purpose.' " *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (citations omitted).

The Wright and Shelby Amendments, unlike the Federal Aviation Act provisions now codified in Title 49 of the U.S. Code, contain no express preemption provision (as discussed below, however, the conference committee report on the Wright Amendment mentioned the issue). The lack of such a provision, however, does not end the matter, for statutes without an express preemption provision may still preempt state and local regulation.

Congressional legislation will preempt state regulation if Congress' regulation of the area is so extensive that it has occupied the field or if there is a conflict between the state regulation and the achievement of the Congressional purpose. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 525-526 (1977). The cities' ability to restrict Love Field service is preempted both because Congress has occupied the field and because allowing the cities to restrict service would frustrate Congress' policies.

The Wright Amendment prescribed in detail the interstate airline services that were and were not permissible at Love Field. The Shelby Amendment modified the zone of permissible interstate service by expanding the boundary of the Love Field service area and clarifying which types of aircraft could be operated under the commuter aircraft exemption. Having chosen to prescribe what interstate service could be operated at Love Field, Congress surely did not intend that Dallas (which in 1980 opposed all interstate service) or other local bodies could override its decision. Given the detailed regulation of

Love Field service set forth in the Wright Amendment, Congress preempted state and local regulation of that area by occupying the field. The same is true for the Shelby Amendment.

An analogous case involved the Supreme Court's decision that the City of Burbank, California, was preempted from regulating noise at Lockheed Air Terminal (now the Hollywood-Burbank Airport). *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). The Court held that the pervasive federal regulation of aircraft noise in particular and flights in general meant that Congress had occupied the field. The Court quoted Justice Jackson's concurring opinion in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303 (1944):

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

Burbank therefore could not impose a curfew on flights at the airport. 411 U.S. at 633-634.

The Court's reliance in the Burbank case on the pervasive federal regulation of aircraft operations supports our decision here that Congress has occupied the field, which similarly involves flight operations at an airport. In contrast to areas historically subject to state regulation, interstate airline operations have always been intensively and virtually exclusively regulated by the federal government.

In addition, any prohibition by Dallas of operations authorized by the Shelby Amendment would frustrate the Congressional purpose of allowing specified types of interstate service at Love Field. When Congress enacted the Wright Amendment, after all, it knew that Dallas and Fort Worth opposed any interstate service at Love Field. If, as contended by the Fort Worth parties, the Wright Amendment was intended only to limit what the Department and the Board could do and to impose no limit on the cities' ability to carry out the Bond Ordinance, there would have been no point in enacting the statute. Dallas would have used its alleged authority to end all interstate service at Love Field, regardless of what Congress legislated.

The conference committee report makes it clear that Congress intended by enacting the Wright Amendment to affirmatively authorize certain types of interstate service. The report stated that the amendment "provides a fair and equitable settlement for a dispute that has raged in the Dallas-Fort Worth area for many years" and that the settlement "has been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Fort Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 96-716 at 24. This statement clearly indicates that Congress was imposing a compromise, which was accepted by all of the parties despite their conflicting interests. Congress' purpose of establishing a compromise would have been frustrated if, as Fort Worth and its supporters argue, Dallas was to be allowed to restrict interstate service unilaterally beyond the limits of the Wright Amendment.

The conference committee report further stated that the Board "will act expeditiously" on any application for authority to operate the services authorized by the Wright Amendment. H.R. Rep. No. 96-716 at 25. That statement, too, shows that Congress had affirmatively determined that airlines should be able to operate the interstate services authorized by the statute, notwithstanding the cities' known opposition to any interstate service. The claim that Congress intended to limit only the Board's authority, not the cities' powers, is illogical – that interpretation would allow the cities to ban the very service that Congress told the Board to authorize.

Thus, even if other airports could use their proprietary powers to restrict service at one airport to protect the competitive position of a second airport, Congress has determined as to Love Field that Dallas' ability to restrict service has been preempted to the extent of the services authorized by the Wright and Shelby Amendments.

The Department recognizes, as the Fort Worth parties point out, that the Wright and Shelby Amendments largely take the form of restrictions on the Department's power (originally the Board's power) to grant certificate authority to airlines to serve Love Field. The Wright Amendment's focus on restricting the powers of the Board (and the Department) makes sense, since Congress had no need to enact provisions blocking the cities from restricting Love Field service. The Board had already held that the cities had no power to veto its grant of authority to an airline to operate a Love Field route. *Southwest Airlines Automatic Market Entry*, 83 CAB 644 (1979). That Board decision caused Congress to enact the legislation limiting the Board's powers to award route authority, but

Congress took no action to overturn the Board's decision that Dallas could not veto such awards.

As a result, the Wright Amendment (and necessarily the Shelby Amendment) must be read as a Congressional authorization for the operation of the specified types of interstate service at Love Field. Thus any restrictions imposed by Dallas that would frustrate that policy are necessarily preempted. *Cf. Fidelity Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982); *Jones v. Rath Packing Co., supra*, 430 U.S. at 541-543.[22]

The Department finds unpersuasive the suggestions by Fort Worth and American that the Wright Amendment only ratified an existing agreement by the cities to allow some interstate service and that the restrictions on interstate service at Love Field resulted from Dallas' exercise of its proprietary rights, not from Congress' exercise of its authority to regulate interstate commerce. Fort Worth Comments at 9; American Comments at 37. Airlines have complied with the Wright Amendment's restrictions because Congress imposed them. The cities, moreover,

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[22] We recognize that we are implying preemption here, despite the lack of an express preemption provision, while our interpretation below of the commuter aircraft exemption is based entirely on the statutory language and our earlier interpretation of the statute. On most questions of interpretation the courts rely on the statutory language. On preemption questions, in contrast, the courts often imply preemption when there is no express preemption provision. The courts are, of course, reluctant to do so as to areas traditionally regulated by the states. The question here involves the regulation of interstate commerce, where the states have always had a smaller and subordinate role.

never amended the Bond Ordinance to reflect their alleged agreement with the Wright Amendment's terms. Legend Comments at 42; Dallas Reply at 12. Their failure to formally incorporate the Wright Amendment limits further demonstrates that they viewed the Wright Amendment as a Congressional determination that was binding on all parties, even though the cities' own agreement – the Bond Ordinance – has always barred services authorized by the Wright Amendment (except as qualified by the phrase "legally permissible").[23]

The Fort Worth parties cite the conference committee report on the Wright Amendment in support of their claim that there is no preemption. *See, e.g.*, Fort Worth Comments at 33. That report, as noted above, stated that the statute would not affect the cities' proprietary rights nor their obligation to comply with the preexisting preemption provision. H.R. Rep. No. 96-716 at 26. But the overall purpose of the statute was, as shown, to allow airlines to operate limited types of service at Love Field, a purpose that would be frustrated if the cities were deemed able to restrict Love Field service. In these circumstances, the report's statement is consistent with the Department's finding that the Wright Amendment was intended to preempt local restrictions on airline service.

Finally, as Dallas points out, the Senate's version of the Shelby Amendment expressly gave Dallas the right to

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[23] Even if the Wright Amendment had codified an agreement by the cities, the parties' rights and obligations would be fixed by the statute, not by the agreement. *Cf. Vollmar v. CSX Transportation, Inc.*, 898 F.2d 413, 417 (6th Cir. 1990).

veto service by reconfigured large aircraft; the conference committee removed that provision. Dallas Comments at 31. This suggests that Congress did not want to give Dallas any ability to block the additional service authorized by the amendment and that Congress believed that Dallas could not block the service unless Congress expressly gave it that authority.

## ISSUE THREE: LONGHAUL SERVICE UNDER THE COMMUTER AIRCRAFT EXEMPTION

Legend and Continental Express plan to operate longhaul service from Love Field with jet aircraft, Continental Express with regional jets designed to hold no more than 56 passengers and Legend with large aircraft reconfigured to hold no more than 56 passengers. Both airlines thus seek to operate under the Wright Amendment's commuter aircraft exemption (an exemption modified by the Shelby Amendment), which allows service operated with aircraft having a passenger capacity of no more than 56 passengers.

The Department stated that it intended to address the airlines' ability to operate under the Wright and Shelby Amendments since some parties have argued that the statutes do not allow longhaul service to be operated with aircraft with a passenger capacity of 56 passengers or less. Those parties contend that Congress intended to allow only short-haul service at Love Field, even if an airline used aircraft with a passenger capacity of 56 passengers or less, and that an airline may not operate jet aircraft under the exemption for aircraft with a passenger

capacity of 56 passengers or less. Fort Worth Comments at 41-42; DFW Board Comments at 37-38, 41.

After considering the arguments on this issue, the Department concludes that the Wright and Shelby Amendments authorize longhaul service with any aircraft with a capacity of no more than 56 passengers. The literal terms of both amendments and the history and obvious purpose of the Shelby Amendment show that the statutes allow such service.

As explained above, subsection (c) of the Wright Amendment allowed an airline to provide nonstop or through scheduled passenger service with large aircraft from Love Field only to points within Texas and one of the states bordering on Texas. However, subsection (a) of the Love Field amendment exempted "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less" from the amendment's restrictions on interstate airline service. Unlike subsection (c), subsection (a) imposes no geographical limit on the services operated with the smaller aircraft. Subsection (a) of the Wright Amendment also contained no equipment type restriction, except for the seating capacity limitation.

The Department's 1985 order interpreting the Wright Amendment included a ruling on which airlines could use the commuter aircraft exemption. The Department ruled then, despite the "commuter airline" phrase in the Wright Amendment, that any airline, not just "commuter" airlines, could offer service under the commuter aircraft exemption with aircraft that satisfied the 56-seat limit. Order 85-12-81 at 13. It stated, "Since Congress specified the size of the commuter aircraft, and since such

aircraft has a limited range consistent with other restrictions of the Amendment, we believe Congress intended aircraft size, rather than license classification of the carrier, to be determinative." Order 85-12-81 at 13 (footnote omitted). The Court of Appeals affirmed this interpretation. *Continental Air Lines v. Department of Transportation*, 843 F.2d at 1454-1455.

The opinions given Centennial Express and Dalfort by, respectively, the Department's Deputy General Counsel and General Counsel suggested that the commuter aircraft exemption allowed operations with any aircraft designed to hold no more than 56 seats. Neither opinion indicated that the exemption allowed flights only with limited types of aircraft, although neither expressly held that regional jets were entitled to operate under the exemption. The opinions additionally suggested that there was no limit on the length of flights operated under the exemption. The Deputy General Counsel's letter to Centennial Express, for example, stated the airline could operate flights to Denver under the commuter aircraft exemption with aircraft meeting the 56-seat standard.

The General Counsel's opinion on Dalfort's proposal led Congress to clarify the law. The Shelby Amendment expressly makes the commuter aircraft exemption available to airlines using large aircraft (except widebody aircraft) reconfigured to have a passenger capacity of 56 passengers or less. Congress, on the other hand, did not overturn the Department's 1985 interpretation that, notwithstanding the "commuter airline" phrase, any airline could use the exemption if it operated aircraft with a passenger capacity of 56 passengers or less.

As modified by the Shelby Amendment, the statute places no geographical limit on the length of service operated under the commuter aircraft exemption and prohibits only the use of aircraft with a gross weight of more than 300,000 pounds. Congress thereby has allowed any airline, including Legend and Continental Express, to operate longhaul service at Love Field with any aircraft, except widebody aircraft, that have a passenger capacity of 56 passengers or less.[24]

The Fort Worth parties nonetheless contend that only short-haul service may be operated under the exemption and that only commuter airline flights using nonjet aircraft are qualified to operate under the exemption. The Department cannot agree with these contentions.

Congress initially created the commuter aircraft exemption for short-haul service, but the exemption never included a restriction on equipment type and, unlike subsection (c), never limited the length of service operated under the exemption. The Department cannot

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[24] Rather than base this decision on the stipulation filed by the Government in dismissing Dalfort's petition for review in *Astraea* (exhibit 12 to Dallas' comments is a copy of the stipulation), the Department will show that the language of the Wright and Shelby Amendments and Congress' intent in enacting the Shelby Amendment clearly allow any airline to operate longhaul service with aircraft with a passenger capacity of 56 passengers or less of any equipment type (except widebody aircraft). The stipulation correctly stated that any airline could operate longhaul service under the commuter aircraft exemption as long as it used a type of aircraft allowed by the Shelby Amendment.

rewrite the exemption to add restrictions like that when Congress never chose to do so.

When Congress enacted the Wright Amendment, only turboprop aircraft had a passenger capacity of 56 passengers or less. Since they were relatively unattractive for travellers on long distance flights, airlines could market turboprop service only on short-haul routes. *See* 43 Fed. Reg. 39587, 39589-35890 (September 6, 1978). In recent years, aircraft manufacturers have developed regional jets, which typically have no more than 56 seats and offer attractive service on long flights. Even if this technological change has undermined Congress' expectation as to the impact of the Wright Amendment's commuter aircraft exemption, the Department could not rewrite the statute by including equipment type restrictions that Congress never included. That is shown by an analogous case involving a federal banking statute, *Independent Insurance Agents v. Ludwig*, 997 F.2d 958 (D.C. Cir. 1993). As the Court stated there, "We decline appellants' invitation to recast the statute to fit contemporary circumstances; when time and technology open up a loophole, it is up to Congress to decide whether it should be plugged, and how." 997 F.2d at 961.

The Department also has no basis for reinterpreting the phrase "commuter airline" to make it a limiting condition on the exemption's use. Thirteen years ago we held that any airline could use the exemption with aircraft with a passenger capacity of 56 passengers or less, and the Court affirmed that interpretation. The Shelby Amendment did not amend the statute to overturn that interpretation. Since Congress is presumed to know how a statute has

been interpreted by the agency responsible for administering it when Congress amends the statute, Congress' failure to overturn that interpretation constitutes a ratification of the interpretation. *See e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1973); *Action on Smoking and Health v. CAB*, 699 F.2d 1209, 1215 (D.C. Cir. 1983). *See also Hilton v South Carolina Public Railways Comm'n*, 502 U.S. 197, 201-202 (1991), emphasizing the importance of following *stare decisis* in statutory interpretation cases.

Even a reinterpretation of the statute limiting the exemption's use to commuter airlines would probably not block regional jet flights at Love Field. As Legend points out, commuter airlines like American Eagle are replacing their turboprop aircraft with regional jets. Legend Reply at 23.

More importantly, even if the Wright Amendment were unclear on these issues, the enactment of the Shelby Amendment shows that Congress no longer intends to limit the commuter aircraft exemption to short-haul service. By expressly allowing any aircraft (except aircraft with a gross aircraft weight of more than 300,000 pounds) to qualify for the exemption, subject only to the maximum 56-passenger capacity limitation, Congress no longer wishes to limit the exemption to short-haul service. After all, the 300,000 pound limitation covers jet aircraft such as B-727's, B-737's, B-757's, some B-767's, and DC-9's that have operating ranges of at least two thousand miles. Congress surely did not view such aircraft as likely to be used only for short-haul service.

While the Shelby Amendment did not specifically address the use of regional jets, Congress' decision to make flights operated with reconfigured large aircraft

eligible for the commuter aircraft exemption, and the lack of any equipment type language in the statute, compel the conclusion that regional jets meeting the 56-passenger capacity standard may also be used under that exemption.

## ISSUE FOUR: ENFORCEABILITY OF DFW USE AGREEMENT RESTRICTIONS BARRING LOVE FIELD SERVICE

The DFW Board contends that its use agreements with airlines such as American and Continental bar those airlines from using any other airport in the metropolitan area for interstate service without the DFW Board's approval (an airline that signs a use agreement is called a signatory airline). The DFW Board additionally claims that it is entitled to enforce those agreements, even assuming that the airport may not unilaterally bar airlines from using competing airports, since the airlines waived their rights to use alternative airports. If the DFW Board's position is valid, only airlines that do not serve DFW, such as Southwest and Legend, and non-signatory airlines, airlines that serve DFW without signing a use agreement, would be able to operate interstate service at Love Field.[25]

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[25] While these agreements have been in effect since DFW opened, no one has challenged the clause barring the use of alternative airports for interstate service, since no signatory airline tried to operate such service until this year (assuming that Continental Express is deemed a signatory airline). While Continental had planned to begin Love Field-Houston service in 1985, that service was intrastate service.

The parties take somewhat different positions on this issue than they do on whether Dallas may restrict service at Love Field. Fort Worth and Dallas support the DFW Board's position. Southwest briefly states its agreement with the DFW Board's position that airlines may contractually waive their rights to use Love Field. While American reaffirms its belief that the cities and the DFW Board may restrict service at Love Field and that the DFW use agreements are valid, it contends that, if we find that the cities and the DFW Board may not restrict service at Love Field, American has the right to operate interstate service at Love Field, even though American is a signatory airline. Legend takes no position on the issue. Continental Express argues that the use agreement is unenforceable because it violates the preemption provision (whether Continental's use agreement restricts Continental Express is a separate issue that we are not addressing here).

On the ground that Continental's use agreement prohibited that airline and affiliated airlines from operating interstate service at other airports in the metropolitan area, the state court's ruling on the summary judgment motions held that neither Continental nor Continental Express could operate interstate flights at Love Field; this ruling is consistent with the court's temporary injunction barring Continental Express's proposed flights from Love Field to Cleveland.

The Department stated that it would consider whether a DFW use agreement would block an airline from exercising its certificate authority to operate flights from Love Field that are consistent with the Wright and Shelby Amendments. Whether the DFW Board can enforce the use agreements barring signatory airlines from operating

interstate service at other airports depends on two federal law questions: whether the DFW Board may bar an airline from using a competing airport, and, if not, whether an airline may nonetheless waive its right to use other airports. The Department has determined to rule on these issues in the context of the Love Field dispute.

As an initial matter, the Department does not agree with the DFW Board's argument that the validity of the use agreement clause is a state contract law question. DFW Board Comments at 42. The clause's validity is necessarily a federal law question as well, because federal statutes, such as the preemption provision, bar airports from imposing some types of restrictions on airlines using an airport. A use agreement that violates federal law is invalid, assuming that an airline may waive its federal right to serve any airport.

As a matter of contract law, the use agreement by its terms does not prohibit signatory airlines from using other airports in the Dallas-Fort Worth area. The agreement does not expressly prohibit the airline party from operating interstate service at any other airport in the area. The agreement instead requires airlines to comply with the Bond Ordinance. Section 3.2 of the agreement states, "Airline agrees that it shall conduct its Certificated Air Carrier Services serving the Dallas/Fort Worth area to, from, and at the Airport, to the extent required by the terms of 1968 Regional Airport Concurrent Bond Ordinance" (DFW Board exhibit 23 is a copy of the relevant part of the use agreement). As discussed above, the Bond Ordinance required airlines to move their services to DFW only to the extent "legally permissible." Since Fort Worth and Dallas do not have the power to prohibit

interstate service at Love Field, the cities' Bond Ordinance cannot stop airlines from using Love Field for interstate service.

If the Bond Ordinance or a DFW use agreement does prohibit a signatory airline's use of a competing airport, the prohibition would be invalid. The DFW Board may not restrict an airline from using a competing airport. The preemption provision, 49 U.S.C. 41713, prohibits state and local governments, including airports operated by state and local governments, from regulating airline rates, routes, and services, except when the state or local government is exercising its legitimate powers as an airport proprietor. As discussed above, Dallas' proprietary powers do not allow it to restrict service at Love Field for DFW's benefit. For the same reasons, the DFW Board may not prohibit or limit an airline's use of a competing airport.[26] Since the cities may not impose regulations prohibiting interstate service at Love Field, the DFW Board may not impose such restrictions by contract. *See, e.g., South-Central Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984).

The DFW Board, supported by Fort Worth and Dallas, contends nonetheless that the DFW Board may enforce the restriction against the use of a competing airport because the signatory airlines have agreed to the restriction and waived any rights they had to use other airports. We cannot agree with that claim. We think that an airline

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[26] In addition, the use agreement appears to be unlawful because it discriminates against interstate commerce by prohibiting an airline from operating any interstate flights from another area airport while placing no limits on intrastate flights.

may not make an enforceable waiver of its rights to serve whichever airport it wishes to serve in the Dallas-Fort Worth area.[27]

The parties claiming that an airline may waive its right to serve a competing airport have unduly minimized the effect of such a waiver. The DFW Board, after all, essentially seeks to regulate airline service in the area by limiting the markets that airlines may serve. The DFW Board's goal is directly contrary to the policies established by Congress in enacting the Airline Deregulation Act of 1978. Congress did not eliminate the Board's authority to regulate airline routes in order to benefit individual airlines. Congress took that action in order to benefit the public – Congress determined that travellers would obtain the best mix of fares and service if airlines were free to respond to market demands. To give airlines the ability to respond to market forces, Congress ended the Board's authority to determine which airline should serve which route. The DFW Board's use agreement would recreate for that body the ability once held by the

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[27] The Department is ruling on the waiver issue in the context of the Love Field dispute and with respect to a contract clause that strikes at the heart of airline deregulation by giving the DFW Board the power to determine what routes may be operated by airlines serving the metropolitan area. The Department recognizes, as the airport trade associations point out, that airlines and other airport users often waive various rights and that waivers unlike the waiver at issue here may be necessary for an airport's efficient operation. *Cf.* 61 Fed. Reg. 31994, 31998 (June 21, 1996) (policy statement governing airport rates and charges). The ruling on the use agreement clause at issue here is not intended to place in doubt the validity of waivers obtained by airports for legitimate reasons.

Board to limit entry and exit in airline markets. In short, the DFW Board's use agreement would, for airlines in the Dallas-Fort Worth area markets, undo the principal feature of Congress' deregulation of the airline industry. The use agreement's bar against the use of a competing airport thus clearly violates public policy (and, as explained, the statutory preemption provision).

As a result, any airline's waiver of its right to determine which airport to serve would be unenforceable. As the Supreme Court has explained, *Brooklyn Saving Bank v. O'Neil*, 324 U.S. 697, 704-705 (1945) (citations omitted),

> [A] statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

*See also* Restatement, Second, Contracts, section 178.

Indeed, so strong in analogous areas is the policy of eliminating anticompetitive practices that a party to a contract that violates the antitrust laws may ordinarily sue the other party for treble damages for the injury caused the plaintiff by the unlawful provisions. *See, e.g., Simpson v. Union Oil Co.*, 377 U.S. 13 (1964); *Perma Life Mufflers v. International Parts*, 392 U.S. 134 (1968). Under general contract law principles, moreover, a contract that acts as a restraint of trade may not be enforced against a

party to the contract. Restatement, Second, Contracts, section 186.[28]

In addition, the Department does not see how the public would benefit from allowing the DFW Board to enforce the use agreement clause. If the DFW Board could restrict the use by signatory airlines of other airports, it would frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of additional competition and additional airline service options. The DFW Board has not shown that the clause is needed to obtain legitimate airport goals. As shown, the DFW Board has no authority to restrict airline service at other airports in order to maximize DFW's revenues.

The DFW Board points out that airlines can gain access to DFW facilities without signing a use agreement and that a number of non-signatory airlines are serving the airport. However, signatory airlines pay lower fees for the use of DFW facilities. DFW Board Reply at 27. The DFW Board has not shown that the reduced fees charged signatory airlines require an airline commitment to use only DFW for interstate flights. The DFW Board has not shown a justification for the restriction, and airlines may not surrender their right under federal law to use other airports in the metropolitan area.

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[28] Similarly, when we readopted our rules on computer reservations systems ("CRSs") in 1992, we declined to give large travel agencies a waiver from the rules on travel agency CRS contracts, because the restrictions on contracts were primarily intended to promote competition in the CRS business, not to protect travel agencies. 57 Fed. Reg. 43780, 43828 (September 22, 1992).

The parties supporting the enforceability of the DFW use agreements mistakenly rely upon language in *American Airlines v. Wolens*, 513 U.S. 219 (1995), in arguing that the agreements may be enforced by the DFW Board. *Wolens* held that the states were not preempted by 49 U.S.C. 41713(b) from enforcing contract obligations voluntarily accepted by a private party. The Court stated, 513 U.S. at 824:

> We do not read [49 U.S.C. 41713(b)], however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings. . . . The [Airline Deregulation Act] . . . was designed to promote 'maximum reliance on competitive market forces.' Market efficiency requires effective means to enforce private agreements. . . . As stated by the United States: 'The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time.'

These statements cannot support a conclusion that the DFW Board can enforce a contract barring an airline from using a competing airport. First, the DFW Board is not a private party – it is a local government agency that seeks to enforce requirements allegedly created by the Bond Ordinance. The Bond Ordinance in turn is not a private contract – it is an agreement between two cities, Dallas and Fort Worth. Secondly, the reliance on the statements in *Wolens* is ironic. The Court held that the state courts should be able to enforce private contracts because doing so was essential to achieve Congress' goal of "maximum

reliance on competitive market forces." The parties relying on this language here wish to frustrate competitive market forces by enforcing an agreement which assertedly denies airlines any ability to use an airport competing with DFW, whether or not there is a market for service at that airport.

The quoted statement in *Wolens* in any event is essentially irrelevant. That decision involved a different issue – whether a state court could apply its general contract law principles in enforcing a contract that did not violate federal law or policy. The case did not involve a party's ability to enforce a contract clause that did violate federal law or policy.

## ISSUE FIVE: RESTRICTIONS ON THROUGH SERVICE FROM LOVE FIELD

At the request of the DFW Board, the Department agreed to consider an issue generated by Continental Express' flights with aircraft with a passenger capacity of 56 passengers or less between Love Field and Houston, a Continental hub. As noted above, subsection (c) of the Wright Amendment prohibits airlines from offering through service between Love Field and points outside the Love Field service area. After beginning its Love Field-Houston flights, Continental Express has been advertising through service between Love Field and points outside the Love Field service area that are served by Continental from its Houston hub (a copy of such an advertisement is at American Comments at 75).[29]

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[29] Without the ability to offer through service, Continental Express and Continental could carry a passenger from Love

The Department therefore stated that it would rule on whether an airline may offer through service from Love Field to points outside the Love Field service area, when the through service would involve the use of a flight with aircraft with a passenger capacity of 56 passengers or less from Love Field to another point in Texas from which the traveller would fly to his or her destination outside the Love Field service area.

The Department begins this analysis with the predicate that an airline may provide through service to points outside the Love Field service area on Love Field flights operated with aircraft with a passenger capacity of 56 passengers or less. As discussed above, the commuter aircraft exemption is created by subsection (a) of the Wright Amendment. That subsection, unlike subsection (c), the subsection governing flights with large aircraft, contains no prohibition against through service. Thus an airline operating under the commuter aircraft exemption may offer through service to points beyond the endpoint of the Love Field flight, since the statute by its terms does not prohibit it from doing so. Congress' decision to expressly prohibit through service in subsection (c) but

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Field to, for example, Lima, Peru, only by selling the passenger a separate ticket for each leg of the journey (that is, Love Field-Houston and Houston-Lima) and requiring the passenger to pick up any checked luggage in Houston and rechecking it for the Lima flight. In addition, Continental Express and Continental could not volunteer information about the availability of the Love Field-Lima service – the traveller could only obtain information by first asking the airline whether such service was available. *See* Order 85-12-81 at 10-11.

not subsection (a) means that through service is allowed under the commuter aircraft exemption.[30]

Continental Express' Houston flights, however, present a more difficult issue for which the Wright Amendment provides no clear answer. Subsection (a) of the Wright Amendment is limited to interstate flights. Thus the statute could be read to say that any intrastate flights, like the Love Field-Houston flights, would be covered by subsection (c) and hence would be subject to the prohibition against through service. In that case, Continental Express' offering of through service to points beyond Houston that are outside the Love Field service area would be unlawful.

Such a reading of the statute would be less reasonable than an interpretation allowing through service on flights within Texas. Congress enacted the Wright Amendment because of the controversy created by the Board's 1979 grant of Southwest's application for authority to operate an interstate route. Southwest was already operating a significant amount of intrastate service from Love Field. Congress intended to resolve the dispute over Love Field service by defining the categories of interstate service that could and could not be operated. Subsections (a) and (b) of the Wright Amendment thus prohibit all interstate

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[30] Some parties opposing Continental Express' position on this issue claim that it was resolved by our earlier interpretation of the Wright Amendment, which stated that an airline could not offer through service on Love Field flights, Order 85-12-81 at 10-13 That language, however, clearly referred to Love Field flights operated with large aircraft subject to the restrictions of subsection (c).

service except services operated with commuter aircraft and a limited number of charter flights, which are exempt under subsection (a), and interstate services being operated on November 1, 1979, which are exempt under subsection (b). Subsection (c) creates another exception – the exception for flights operated with large aircraft between Love Field and points in Texas and the states bordering on Texas – but does not prohibit any kind of service. As a result, the only express prohibitions are those in subsections (a) and (b), which are limited to interstate service. The Wright Amendment accordingly does not restrict intrastate flights.

Subsection (c) could be read as assuming that an airline that operated intrastate flights from Love Field could not offer through service to points outside the Love Field service area from the endpoint of the Love Field flight, whether the flight ended at another Texas city or at a city within one of the four states bordering on Texas. In our view, the prohibition against through service in that subparagraph forms one of the conditions under which Congress was willing to allow some interstate service with large aircraft at Love Field. Congress authorized such interstate service on the condition, among others, that the airline did not offer through service to points beyond the Love Field service area.

There is no reason, moreover, why Congress would have intended to prohibit through service on flights operated with aircraft with a passenger capacity of 56 passengers or less to points within Texas but not on flights operated with such aircraft to points outside Texas. Furthermore, the Shelby Amendment demonstrates that Congress is

less interested in limiting Love Field to short-haul service, when the Love Field flight is operated with aircraft with a passenger capacity of 56 passengers or less. As shown above, the Shelby Amendment allows large aircraft to be used under the commuter aircraft exemption, if reconfigured to have a passenger capacity of 56 passengers or less. Congress' willingness to allow large aircraft to operate longhaul service under the commuter aircraft exemption suggests that a reading of the statute allowing through service over a connecting point in Texas would be consistent with Congress' intent.

Although Southwest claims that an interpretation allowing airlines operating Love Field flights with aircraft with a passenger capacity of 56 passengers or less to offer through service will discriminate against it, since it operates only large aircraft, that result stems from Southwest's operational decisions. Southwest has chosen to use only one type of aircraft, which is configured to hold more than 56 seats. Our interpretation will allow Southwest to offer through service from Love Field if it chooses to use smaller aircraft. Thus any discrimination stems from Southwest's own decisions, not from our interpretation of what Congress enacted. *Cf.* Order 85-12-81 at 10.

**ACCORDINGLY:**

1. The Department holds that (i) the City of Fort Worth may not enforce any commitment by the City of Dallas under the Bond Ordinance or other agreement to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type

of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment;

2. The Department grants the motions by the City of Fort Worth and Legend Airlines to supplement the record; and

3. The Department grants the motions for leave to file surreplies and other unauthorized documents.

By:

**CHARLES A. HUNNICUTT**
Assistant Secretary for Aviation
And International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at http://dms.dot.gov/general/orders/aviation.html*

## APPENDIX C

**Order 98-12-28**

(LOGO)

**UNITED STATES OF AMERICA**
**DEPARTMENT OF TRANSPORTATION**
**OFFICE OF THE SECRETARY**
**WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 22nd day of December, 1998
Served December 23, 1998

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| LOVE FIELD SERVICE INTERPRETATION PROCEEDING | Docket OST-98-4363 |

ORDER ON PROCEDURAL MOTIONS

The Department began this proceeding to issue interpretations on several federal law issues raised by the current dispute over whether airlines may operate the additional services at Dallas' Love Field authorized by legislation enacted by Congress in 1997, Section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-56, 111 Stat. 1425, 1447 (October 27, 1997) ("the Shelby Amendment"). Order 98-8-29 (August 25, 1998). This Department, including the Federal Aviation Administration ("FAA"), is responsible for administering the relevant statutes. The Department undertook a similar proceeding to interpret the statutory restrictions on Love Field service imposed by Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980) ("the

Wright Amendment"). *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985), *aff'd, Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988).

The Department is simultaneously issuing an order that addresses those legal issues. The parties' pleadings, however, raised a number of procedural issues that are addressed in this order. This order denies the requests by Fort Worth, American Airlines, and the DFW Board for the dismissal of this proceeding. The Department also finds that Fort Worth's allegations of bias and *ex parte* contacts by Department officials and staff members have no factual basis.

## FACTUAL AND LEGAL BACKGROUND

The companion order sets forth in detail the factual and legal background to the current dispute over additional Love Field service. This order provides the background information relevant to the parties' procedural requests.

### State Court Litigation

The current dispute between the parties has resulted in litigation in both the federal and state courts in Texas. Fort Worth initiated the state court proceeding by filing a suit against Dallas, Legend, and others to block additional service at Love Field. *City of Fort Worth, Texas v. City of Dallas, Texas, et al.*, Tarrant County District Ct. No. 48-171109-97 (filed October 10, 1997). American Airlines and the DFW Board have intervened in that case to support Fort Worth's position. Fort Worth argues that Dallas is required by their agreement, set forth in their

1968 Regional Airport Concurrent Bond Ordinance ("the Bond Ordinance"), to bar airlines from operating any service not authorized by the Wright Amendment. Dallas, Continental Express, and Legend have contended that airlines may operate the additional services authorized by the Shelby Amendment and that Fort Worth has no right to compel Dallas to deny airlines the ability to use Love Field for such services.

On July 9, 1998, the state court enjoined Continental Express from operating Love Field-Cleveland flights pending the court's final decision.

On October 15 the state court granted the summary judgment motions filed by Fort Worth, American, and the DFW Board against Dallas, Continental Express, and Legend. The court found that Dallas was obligated by the Bond Ordinance (as amended by the Wright Amendment) to bar airlines from operating services permitted by the Shelby Amendment and that federal law did not override the cities' agreement restricting Love Field service.

Continental Express initially appealed the grant of the temporary injunction but withdrew the appeal after the trial court issued its decision on the summary judgment motions. Continental Express and Legend have publicly stated that they will appeal that decision.

As explained in more detail below, the state court litigation (and the related federal court litigation described below) caused most of the parties in the dispute – Fort Worth, American, Dallas, Legend, and Continental Express – to meet with Department officials, including FAA officials, to discuss the dispute and to ask for our assistance before we began this proceeding.

In addition, on the eve of the state court's hearing on the temporary injunction requests, Continental Express asked the Department whether it could issue a statement of its position on certain issues that were likely to be relevant at the hearing. On June 30, Nancy E. McFadden, the Department's General Counsel, provided Continental Express a letter restating the Department's position on two factual issues, while declining to give a ruling on two legal issues, since the Department had not previously issued a ruling on the latter issues (a copy of her letter is in the docket for this proceeding).

Federal Court Litigation

After Fort Worth sued Dallas in state court, Dallas filed a federal court suit against this Department and Fort Worth to obtain a declaratory judgment that Dallas may not bar airlines from operating service authorized by the Shelby Amendment. *City of Dallas, Texas v. Department of Transportation et al.*, N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). The federal court has consolidated that case with a similar case filed by Continental Airlines and Continental Express, *Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth*, N.D. Tex. No. 398CV1187-R (filed May 19, 1998).

Related Administrative Proceedings

Legend has filed an application for certificate authority under 49 U.S.C. 41102 so that it may begin airline operations, Docket OST-98-3667. Fort Worth is opposing Legend's application in part on the ground that Legend's

proposed service – longhaul flights from Love Field operated with large aircraft reconfigured to hold no more than 56 seats – would allegedly violate the Wright Amendment. Fort Worth Answer at 13-17, Docket OST-98-3667. Fort Worth urged the Department to delay ruling on Legend's application until the state court had decided whether Legend's proposed service would be lawful. *Id.* at 21-22. American filed an answer concurring with Fort Worth's position.

The Department has issued a show-cause order tentatively finding that Legend meets the statutory requirements for obtaining certificate authority. Order 98-10-15 (October 16, 1998). The Department stated that it would consider in this proceeding the arguments about Legend's ability to carry out its service proposal, if it does not grant Fort Worth's motion to dismiss. *Id.* at 4-5.

Finally, the FAA began an enforcement proceeding against Centennial Airport, an airport near Denver, which has imposed operating restrictions analogous to the ones that Fort Worth wishes to impose on Love Field. The FAA has issued a Director's Determination, a preliminary decision, holding that the Arapahoe County Public Airport Authority, the airport's owner, has violated its obligations under federal law. *Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority*, FAA Docket Nos. 16-98-05 *et al.*, Director's Determination (issued August 21, 1998) ("Centennial Decision") (exhibit 17 in the DFW Board's comments is a copy of this FAA decision). After the Director's Determination was issued, an FAA hearing officer held a hearing in the case as provided by 14 C.F.R. Part 16.

## THE PARTIES' COMMENTS AND MOTIONS

The dispute over new service at Love Field led the Department to institute this proceeding, as explained in Order 98-8-29. The requests by most of the parties in the litigation for the Department's assistance and the importance of the issues caused the Department to conclude that it should issue an interpretation of the the [sic] relevant federal statutes. Order 98-8-29 (August 25, 1998). As noted in that order, this Department, including the FAA, is responsible for administering the relevant statutes. Moreover, the Department had held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing *Love Field Amendment Proceeding*, Order 85-12-81 (December 31, 1985), *affirmed, Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988). In this instance the Department stated its intent to issue a ruling that the courts could consider. Order 98-8-29 at 5.

After the proceeding began, Fort Worth filed requests to dismiss this proceeding and for disclosure of the circumstances surrounding the General Counsel's letter to Continental Express. The Department stated that it would defer ruling on those requests until it had reviewed the parties' comments and reply comments. Order 98-9-5 at 2-4.

In their comments on the merits, Fort Worth, American, and the DFW Board essentially argue that federal law allows Dallas as Love Field's proprietor to restrict services at that airport permitted by the Wright and Shelby Amendments. They also argue that the Department should not issue any ruling on federal law issues relevant

to the Love Field dispute. They additionally ask the Department to hold an oral argument before deciding this proceeding.

Fort Worth renews its request for disclosure and asserts that discovery in the state court case has shown that Department officials and staff members had contacts about the case with parties other than Fort Worth, which allegedly indicates bias and unlawful *ex parte* communications. No other party has supported these assertions by Fort Worth.

The DFW Board also requests the Department to mediate the dispute over Love Field service and to suspend this proceeding during mediation.

Dallas, Southwest, Continental Express, and Legend contend that the Department may and should issue a decision on the federal law issues. These parties assert that Dallas may not bar airlines from operating the Love Field services authorized by the Wright and Shelby Amendments.

Legend and Continental Express contend that Fort Worth's requests for further disclosure are without merit. Legend notes, among other things, that American had several contacts with Department officials and staff members before the Department began this proceeding. Legend contends that under established administrative law principles all such contacts were proper, since the prohibition against *ex parte* communications does not apply before a proceeding has begun.

Dallas and Legend oppose the request for oral argument. Dallas, Continental Express, Southwest, and Legend oppose the DFW Board's request for mediation.

## SUMMARY OF THE DEPARTMENT'S PROCEDURAL DECISIONS

Since the Department has the responsibility to administer the federal statutes relevant to the Love Field dispute, the Department has concluded that it should publish a decision interpreting the relevant federal statutes. The Department is therefore denying Fort Worth's request to dismiss this proceeding.

The Department is denying Fort Worth's request for disclosure – Fort Worth has cited nothing suggesting any bias or improper conduct by Department officials and staff members, and the courts have refused to require the type of disclosure sought by Fort Worth except in rare cases where, unlike here, there is clear evidence of agency misconduct. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994). The conduct cited by Fort Worth violated no statute or Department rule and created no unfairness for Fort Worth. The Department is also denying the requests for oral argument, for no party has shown that an oral argument is necessary or would be useful in this proceeding.

## THE DEPARTMENT'S JURISDICTION

The Department's authority to issue a ruling interpreting the federal laws applicable to Love Field is firmly established. The relevant statutes are statutes that we are responsible for administering and enforcing. As the

Supreme Court stated, "The Secretary of Transportation is charged with administering the federal aviation laws. . . . " *Northwest Airlines v. County of Kent*, 510 U.S. 355, 366-367 (1994). *See also New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 172 (1st Cir. 1989). The dispute over Love Field service, moreover, raises substantial federal issues that this Department should address, in particular, the ability of a local airport owner to restrict service at a second airport to improve the competitive position of the first airport. The Administrative Procedure Act authorizes the Department to issue declaratory orders such as this. 5 U.S.C. 554(e). *See, e.g., British Caledonian Airways v. CAB*, 584 F.2d 982 (D.C. Cir. 1978).

The Department is specifically responsible for enforcing the Wright Amendment (and thus the Shelby Amendment, which amends the Wright Amendment), as the Fifth Circuit has stated. *Cramer v. Skinner*, 931 F.2d 1020, 1024 (5th Cir. 1991), *cert. denied*, 502 U.S. 907. As noted above, the Department has already issued one order interpreting the Wright Amendment, Order 85-12-81 (December 31, 1985). The Department's General Counsel and Deputy General Counsel have also written opinions interpreting that statute. *See* September 16, 1996, letter from Nancy E. McFadden, the Department's General Counsel, to Dalfort Aviation, and May 16, 1994, letter from Rosalind A. Knapp, the Department's Deputy General Counsel, to Centennial Express.

In affirming our order interpreting the Wright Amendment, the Court of Appeals held that our interpretation of that statute was entitled to deference, a holding which necessarily assumes that the Department is the agency

responsible for administering the restrictions. *Continental Air Lines v. DOT*, 843 F.2d 1444 (D.C. Cir. 1988). Any doubt about our responsibility for administering the Wright Amendment was resolved in a case challenging the constitutionality of that statute, *State of Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994). There the Court of Appeals specifically acknowledged that this Department "administers the statute." 16 F.3d at 438.

Similarly, when the Texas Court of Appeals ruled on Continental's efforts to begin Love Field-Houston service over ten years ago, it relied in part on the Department's determination that Continental's proposed service would be intrastate service. *City of Dallas v. Continental Airlines*, 735 S.W. 2d 496, 503 (Tex. Ct. App. 1987).

The other statute interpreted in this proceeding is the preemption provision, including the exception for airport proprietor's rights, 49 U.S.C. 41713(b), which was added to the Federal Aviation Act by the Airline Deregulation Act of 1978. The Secretary is responsible for enforcing the Federal Aviation Act, now Part A of Subtitle VII of Title 49 of the U.S. Code, including the preemption provision. The statute thus provides, "On the initiative of the Secretary of Transportation . . . , the Secretary . . . may conduct an investigation, if a reasonable ground appears to the Secretary . . . for the investigation, about . . . any question that may arise under this part." 49 U.S.C. 46101(a)(2). The statute additionally authorizes the Secretary to "take action the Secretary considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders." 49 U.S.C. 40113(a). As part of its responsibility

for administering the Act's economic regulatory provisions, the Board issued a policy statement defining the kinds of state regulation that were preempted by 49 U.S.C. 41713(b). 14 C.F.R. 399.100, adopted by 44 Fed. Reg. 9948 (February 15, 1979).

The Supreme Court has expressly recognized that this Department is responsible for administering and interpreting the preemption provision. In *Wolens v. American Airlines*, 513 U.S. 219 (1995), the Court described this Department as "the superintending agency" for the preemption provision, 513 U.S. at 229, n. 6, and upheld the statutory interpretation urged by the United States, in part because the interpretation had the approval of the statute's "experienced administrator," the Department of Transportation, 513 U.S. at 234. The lower courts have also recognized this Department's responsibility for administering the preemption provision. In *New England Legal Foundation, supra*, the First Circuit held that the district court should have deferred its ruling on whether an airport fee violated the preemption provision until we had issued a decision on the issue. 883 F.2d at 173. And the scope of the airport owner's proprietary rights is one of the issues that the FAA necessarily addressed in its Centennial Decision. Centennial Decision at 27-31.[1]

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[1] To support their position that the Department should not decide the preemption issue, Fort Worth, the DFW Board, and American have cited a brief filed by this Department with the Board in one of the Board's Love Field proceedings. The brief asserted that the Board had no responsibility for administering that statutory provision. *See, e.g.*, Fort Worth Comments at 15. Whether the brief's description of the Board's role was accurate, the cited statement does not accurately characterize the

The Department also finds that it has the responsibility to use this authority to issue an order interpreting the federal statutes relevant to the Love Field dispute. The dispute largely involves the meaning of those statutes. Given its responsibilities for administering those statutes, the Department should assist. the parties by issuing its interpretation. The Court of Appeals approved our taking similar action in 1988. Moreover, the Department is a party in the pending federal court suit and presumably will have to state its position there. That likelihood further supports the Department's determination that it should issue this order, where the Department can determine the proper interpretation after giving the parties the opportunity to present their arguments.

The Department's dismissal of this proceeding would create a dilemma for Dallas. Dallas as Love Field's owner must comply with the applicable federal statutes. Dallas is understandably concerned that the Department's interpretation of the applicable laws could be inconsistent with the state court's decision. As the city explains, "Dallas strongly wishes to avoid a situation in which it is first forced to comply with a state court judgment directing it to impose a perimeter rule and later found by the Department to be violating its grant assurances or federal law by imposing that same rule." Dallas Reply at 8. The Texas state court proceeding will not prevent us from taking enforcement action against Dallas, because the

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Department's responsibilities, as is apparent from the statute itself; the Supreme Court's decision in *Wolens;* the Department's decision in the Massport case, affirmed in *New England Legal Foundation;* and the FAA's Centennial Decision.

Department is not a party to that proceeding and will not be bound by the decision. The Department's issuance of its interpretation will reduce Dallas' risk of being required to comply with inconsistent decisions, since the Texas appellate courts will be able to consider the Department's interpretation. For these reasons, Dallas urges the Department to issue a ruling interpreting the federal statutes.

In arguing that the Department should nonetheless dismiss this proceeding, Fort Worth and American contend that the Texas courts can decide the relevant issues and should be allowed to do so. The Department agrees that the Texas courts could decide the federal statutory issues raised by the Love Field dispute without any interpretation being issued by it. However, the better course is for the Department to issue its own interpretation of the applicable statutes, which it administers and can enforce against Dallas as Love Field's owner. Fort Worth and American, moreover, never explain why the Department should dismiss this proceeding and thereby increase Dallas' risk of being subject later to conflicting orders from us and the state courts.[2]

Furthermore, as noted above, Fort Worth and American have contended in Docket OST-98-3667 that the Department may not grant Legend's application for certificate

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[2] Fort Worth's supplemental motion to dismiss, filed December 1, mistakenly assumes that the state courts could issue a final decision on the dispute that would avoid other litigation. Since the state courts' decision would not bind the Department, their decision would not finally resolve the dispute.

authority because Legend's service proposal allegedly violates the Wright and Shelby Amendments. The Department has the responsibility for determining whether Legend's application satisfies the statutory standards for certification. The existence of these issues in the Legend certificate proceeding thus further supports the Department's decision to rule on the federal law issues here.

American and Fort Worth err by asserting that the pendency of the state court case precludes the Department from issuing a ruling on the federal law issues. They wrongly claim that the Anti-Injunction Act, 28 U.S.C. 2283, prohibits the Department from issuing this order while the state court proceeding is pending. The Anti-Injunction Act bars federal courts from stopping state court proceedings (with some exceptions) but does not restrict federal agencies. The existence of a state court suit does not bar a federal agency from carrying out its responsibilities. In *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), the Supreme Court declared, "The purpose of [the Anti-Injunction Act] was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights." 404 U.S. at 146.

The state court itself, moreover, has not opposed this proceeding. And the federal district court in Dallas will probably be deciding a case involving the same issues, despite the existence of the state court proceeding.

In addition, the Department has decided other cases where a related case was pending in a federal court. For

example, the First Circuit affirmed the Department's decision on Massport's fees, reversed the district court's contrary decision, and held that the district court should have delayed deciding its case until the Department issued its decision. *New England Legal Foundation*, 883 F.2d at 173.[3] *Cf. Alaska Airlines et al., Wien Acquisition*, 82 CAB 1636, 1651 (1979).[4]

The Department disagrees with American's complaint that its ruling will increase rather than decrease the amount of litigation. In any event the Department as the administrator of the statutes has the responsibility to issue its interpretation of their meaning.

Finally, the Department does not agree with the suggestions by Fort Worth and American that, instead of issuing

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[3] Fort Worth and American contend that the First Circuit's decision is not relevant, since one basis for the court's decision was the existence of complex factual issues involving airport rates. The dispute here, in contrast, appears to involve no complex factual issues. *See, e.g.*, Fort Worth Reply at 3. The First Circuit, however, noted that the Massport fee dispute involved no factual disputes and based its decision in part on Congress' decision to make the Secretary responsible for administering federal aviation laws. *New England Legal Foundation*, 883 F.2d at 167, 172-173.

[4] The parties argue over whether the doctrine of primary jurisdiction applies to the federal law issues raised by the Love Field dispute. *See, e.g.*, Fort Worth Comments at 13-18; Continental Express Reply at 20-23. The issue is not relevant here, since the Department is not considering whether the state courts must suspend their proceedings on primary jurisdiction grounds.

this order, it should present its views by either intervening or participating as an *amicus* in the state court proceedings. *See, e.g.,* Fort Worth Motion to Dismiss at 9; American Comments at 80-82. The Department has the responsibility for administering the federal statutes and resolving the issues raised in the Legend certification case. Congress has entrusted the Department with the task of ensuring that airports and their owners comply with the requirements established by statute to achieve Congress' policy goals.

## BACKGROUND TO FORT WORTH'S REQUEST FOR DISCLOSURE

Fort Worth suggests that the Department's staff may be biased and may have engaged in improper *ex parte* communications. It bases these suggestions on the contacts between Department officials and staff members, on the one hand, and several of the parties and on the General Counsel's letter to Continental Express. Fort Worth has used these allegations of possible bias and *ex parte* communications to demand that the Department disclose information regarding the General Counsel's letter to Continental Express and related matters.

Fort Worth, however, has not asked that any official or staff member of the Department be recused from this proceeding. No other party has supported Fort Worth's suggestions of possible bias and improper conduct. Fort Worth itself has not tried to show that any specific communication has prejudiced it, even though the state court discovery process has enabled Fort Worth to learn what

the other parties told Department officials and staff members.[5]

The Department rejects Fort Worth's insinuations of improper conduct. Fort Worth has provided no factual or legal support for its allegations of improper conduct. Among other things, Fort Worth ignores the many contacts that its ally, American, has had with Department officials and staff members on Love Field issues and Fort Worth's own meeting with Department officials and staff members.

This order will first describe the contacts with the parties and the letter given Continental Express and then show why Fort Worth's allegations are entirely unsupported and that these actions were proper.

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[5] The state court allowed Fort Worth and other parties to conduct discovery into the parties' contacts with the Department on Love Field issues. Fort Worth has filed copies of interrogatory answers and deposition transcripts discussing the other parties' contacts that it obtained by discovery. In response, Legend filed similar documentation on the contacts by Fort Worth and American. Legend, however, contends that the contacts with the parties were proper. The Department believes that no federal court would have permitted the type of discovery authorized by the state court, since Fort Worth has failed to show any likelihood of bias or *ex parte* communications. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994); *United States v. Morgan*, 313 U.S. 409, 422 (1941). The state court discovery, however, has demonstrated that Fort Worth's allegations are baseless.

Department Contacts with the Parties

As discussed above, after the litigation began in the courts in Texas, most of the parties in the dispute, including American and Fort Worth, met with Department officials and staff members to urge the Department to take some action to help resolve the dispute. Some of these parties, primarily American and Legend, also sent letters and discussed the state court proceedings in telephone conversations with Department officials and staff members.

On May 6, 1998, Fort Worth's mayor and other Fort Worth representatives met with Department officials and staff members to ask the Department to mediate the dispute. Before the Department began this proceeding, American urged it in several meetings and telephone conversations with Department officials to take no action and to allow the state courts to resolve the dispute. American also argued that additional Love Field service would be harmful and unlawful. Legend Reply at 46-49; Legend Motion to Supplement the Record.

Dallas and Legend, on the other hand, urged the Department to intervene in the state court proceeding; if the Department was unwilling to do that, they suggested that it should issue a ruling interpreting the relevant federal statutes. They arged [sic] that the Department should intervene because the litigation involved important federal legal and policy questions that might be wrongly decided by the state courts if they were not given the Department's position on those issues. These meetings included a discussion of the relevant legal issues, since they necessarily wanted to show that their position on the

legal issues was correct and that Fort Worth's position was incorrect. Legend also sent several letters urging the Department's intervention in the state court proceeding.

In all of these meetings and conversations, Department officials and staff members listened to the views of the parties but made no commitment and expressed no view on the legal issues.[6] After this proceeding began, Legend wrote a letter intended to cause the Department to intervene in the state court proceeding; the letter did not discuss the merits of this proceeding. McArtor Deposition at 246-247, attached to October 19 Fort Worth Motion to Supplement the Record.

Department staff members and officials have had several contacts with Continental Express, primarily after this proceeding began, but those contacts resulted from Fort Worth's efforts to suggest that the opinion given Continental Express demonstrated improper favoritism. The Department staff members discussed the litigation with Continental Express to confirm that Fort Worth's allegation had no factual support whatever. Cox Answers to Deposition at 15-17, attached to October 21 Fort Worth

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[6] Officials from both Continental Express and Legend have testified, for example, that they had no knowledge of the Department's intent to hold this proceeding until it published the order beginning the proceeding. Cox Answers to Deposition at 16, 22, attached to October 21 Fort Worth Motion to Supplement the Record; McArtor Deposition at 49-50, 55, 86, attached to October 19 Fort Worth Motion to Supplement the Record. American's suggestion, American Reply at 4, that the Department may have given some parties advance notice of its decision to conduct this proceeding is incorrect, for it told none of the parties.

Motion to Supplement the Record. Legend also informed Department officials of the allegations made by Fort Worth in the state court proceeding. These communications did not involve any discussion of the merits of this proceeding.

American has also had some contacts with Department officials and staff members after this proceeding began, primarily to discuss the charges made by Fort Worth in the state court proceeding. The DFW Board asked Department officials on numerous occasions to mediate the dispute, a request made later by a motion filed in the docket. Legend Motion to Supplement the Record.

Before this proceeding began, the Department received letters from Senator Trent Lott, the Majority Leader of the United States Senate, and Congressman Bud Shuster, the Chairman of the Committee on Transportation and Infrastructure of the United States House of Representatives, asking the Department to take action to assert the federal interests involved in the dispute. After the proceeding began, the Department received letters supporting Fort Worth's position from Senator Kay Bailey Hutchison and Congresswoman Kay Granger and status inquiries from Senator Lott, Congressman Martin Frost, and the staff of the Senate Appropriations Committee.

The General Counsel's Letter to Continental Express

On June 30, as noted, Nancy E. McFadden, the Department's General Counsel, sent Continental Express a letter discussing several issues relevant to the state court's hearing on the motions to enjoin Continental Express' proposed Love Field-Cleveland flights (we have placed a

copy of her letter in the docket for this proceeding). This proceeding began eight weeks later, on August 25.

Continental Express had asked the Department whether it could issue a statement of its position on certain issues that were likely to be relevant at the hearing. The June 30 letter responded in part to the airline's request. Continental Express had asked her for the Department's position on four issues. Two of the issues were whether additional service at Love Field would decrease safety or threaten the viability of DFW. The General Counsel set forth the Department's earlier findings on those two issues. The other two issues were legal questions: whether Dallas could restrict service at Love Field to carry out its agreement with Fort Worth and whether the Wright and Shelby Amendments allow airlines to operate longhaul service at Love Field with regional jets. The letter stated that the Department had not specifically addressed those issues and expressed no opinion on them. It noted, however, that the earlier rulings on the proposals by Centennial Express and Dalfort had suggested that an airline could use aircraft with a passenger capacity of 56 passengers or less of any type to provide longhaul service from Love Field and that the Shelby Amendment had overturned her opinion that reconfigured large aircraft could not be used to provide longhaul service.

## THE DEPARTMENT'S CONDUCT WAS PROPER

Neither the sending of the letter to Continental Express nor the contacts with the parties were improper. Fort Worth, despite its extensive discovery efforts, cites no facts indicating that any *ex parte* communications

occurred (that is, communications occurring after the Department began this proceeding that discussed the merits of the federal law issues being considered here), that any Department official or staff member is biased, or that Fort Worth's due process rights have in any way been violated. Fort Worth has failed to explain how any statute, regulation, or judicial decision supports its claims.

Fort Worth's request, moreover, on its face is extraordinary – Fort Worth essentially assumes that any contact with the parties opposing Fort Worth was improper, while any contact with Fort Worth and American is proper. In addition, the General Counsel's letter expressly refused to state an opinion on the legal issues being considered in this proceeding.

The various contacts with the parties on the dispute created no unfairness. As explained, Department officials and staff members met with most of the parties in the litigation. Fort Worth has never tried to explain why it would be unfair for the Department to meet with the parties opposed to its position when Fort Worth itself met privately with Department officials and staff members.[7] In any event, virtually all of the meetings with the parties

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[7] One of the Legend communications cited by Fort Worth as an alleged *ex parte* communication is a fax to a Department official referring to the Department's agreement to give Legend copies of materials given the Department by Fort Worth, American, and the DFW Board. December 9, 1997, fax from Edward Faberman, attached to October 13 Fort Worth Motion to Supplement the Record.

occurred before this proceeding was begun. Those meetings did not involve any *ex parte* communications, for both the Administrative Procedure Act's *ex parte* rules and our *ex parte* rules do not restrict communications occurring before the beginning of the administrative proceeding. 5 U.S.C. 557(d)(1)(E); 14 C.F.R. 300.2. Fort Worth has cited no evidence that any communication occurring after we began this proceeding discussed the merits of the federal law issues being considered here or that the earlier communications have prejudiced its ability to present its case.

The discussions of the state and federal court litigation were proper. The Department has been a defendant in a federal court suit on Love Field issues, and several of the parties in the state court suit thought the Department should intervene in that proceeding to protect the federal interests at stake. Discussions focused on whether and why the Department should participate in the litigation are proper. Government agencies are often asked by parties in court proceedings to participate in order to present the United States' position. No court has ever held that such contacts prejudiced related administrative proceedings. The Department, moreover, declined to intervene in the state court proceeding.

Fort Worth has cited no evidence, despite its extensive discovery efforts, indicating that Continental Express or Legend actually tried to influence the outcome of this proceeding. The communications that occurred after this proceeding began primarily involved matters raised in the state court litigation (principally Fort Worth's charges of bias) and included no discussion of the issues in this

proceeding. Legend's communications similarly represented renewed efforts to persuade the Department to intervene in the state court proceeding. McArtor Deposition, Exhibit 7, attached to October 19 Fort Worth Motion to Supplement the Record.

In addition, Fort Worth's position on the issue of the contacts is contrary to its position on how the Department should best state its position on the legal issues. Fort Worth asserts that, if the Department should take a position on the issues at all, it should do so by filing a brief stating that position in the state court proceedings. Fort Worth Motion to Dismiss at 9. If the Department had followed that course, the Department could have developed its litigation position in private consultations with parties and given no party a right to formally present its arguments to the Department. This proceeding, on the other hand, has given all parties a formal opportunity to present their arguments.

The Department is basing its decision on the legal issues on the pleadings filed in this proceeding, not on any information given it by a party outside the formal record. The courts will review this decision, moreover, on the basis of the analysis in this order and the record in this proceeding.

The General Counsel's letter to Continental Express was not improper. The letter on its face cannot support any claim of bias since she specifically declined to rule on legal issues that had not been previously resolved by the Department. Fort Worth itself has not objected in this proceeding to any of the statements made in the letter. The General Counsel's letter accurately presented the

Department's position on the issues discussed in it. The Department staff attorney most familiar with Love Field issues drafted the letter, and the only revisions to the text of his draft were made by several Department officials and staff members who reviewed the draft.

Continental Express had requested the letter, since it thought that the state court could otherwise be unaware of the Department's position on several relevant issues. The importance of the issues reasonably caused the General Counsel to believe that providing a statement of the Department's position, to the extent that the Department had established a position, would assist the court. Accordingly, the letter was sent in a timely fashion.

Even if the General Counsel's letter were read as stating a position on issues relevant to this proceeding, that would not make this proceeding unfair. The Supreme Court has held that a statement of views on an issue by an agency member does not require the member's disqualification in an adjudicatory proceeding. *FTC v. Cement Institute*, 333 U.S. 683, 700-703 (1948). Staff officials are equally entitled to hold policy views. *Texas Int'l-Pan American-National Acquisition Cases*, 80 CAB 324, 337 (1979). *See also National Airlines, re Board Employee Testimony*, 82 CAB 160 (1979). The courts have similarly held that an agency may fairly decide a proceeding even if the agency initially began the proceeding due to its determination that there was a likelihood of unlawful conduct by the respondent or if the agency had sought a preliminary injunction against the respondent pending completion of the agency proceeding. *Withrow v. Larkin*, 421 U.S. 35 (1975); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174 (D.C. Cir. 1998).

We note that as well that Fort Worth suggested in the state court proceeding that the General Counsel agreed to respond to Continental Express' request because of past connections between the General Counsel and a lawfirm that allegedly represented the airline. There is no basis for Fort Worth's suggestion. The lawfirm was not involved in the matter and never discussed the opinion request with the General Counsel. The record compiled as a result of the state court discovery demonstrates that the firm never contacted the Department on this proceeding.

Statements That the Department, Dallas, and Legend Had Common Interests

In an apparent effort to limit discovery by Fort Worth in the state court proceeding, Legend and Dallas each objected to several of its discovery requests on the basis that this Department and Legend or Dallas had common interests under Texas law. American and Fort Worth suggest that Legend's statement puts in question our impartiality. Fort Worth Request for Limited Hearing; American Surreply at 4, n. 1.

The Department disagrees. Whatever action was taken by Legend and Dallas was taken without its authorization and without any commitment that it would agree with their position on the issues. Thus far the Department has taken no position on the merits in the district court suit filed by Dallas against it and Fort Worth and has made no promises to Legend or Dallas on what position it may ultimately take.

Denial of Requests for Disclosure and Abatement. Fort Worth has asked the Department to disclose various

matters related to the opinion given Continental Express and to hold a limited hearing to investigate the alleged *ex parte* communications. Since Fort Worth has completely failed to substantiate its charges of unfairness, the Department will deny these requests. Due to its failure to show any indication of improper conduct, it has no right to investigate the Department's decisionmaking processes. As stated in *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994), "Requiring an agency to produce such internal materials and allowing litigants to depose agency officials about such matters would be warranted only in the rarest of cases." *See also United States v. Morgan*, 313 U.S. 409, 422 (1941). This is clearly not a case where a party is entitled to disclosure of the Department's procedures and decisionmaking.

Furthermore, the state court has already allowed Fort Worth to pursue these matters by discovery. Fort Worth has failed to explain why it needs any additional opportunity to investigate the issue.

Fort Worth also asked the Department to abate this proceeding until it conducts more discovery in the state court case. The Department sees no need to delay its decision on that ground. Fort Worth has provided no evidence of bias or improper conduct. There is therefore no reason to delay this proceeding. Fort Worth in any event has conducted additional discovery and still failed to find evidence supporting its allegations of improper conduct.

## ORAL ARGUMENT

The DFW Board filed a motion for oral argument four days after the deadline for reply comments. The DFW Board asserts that the issues being considered here are the kind of issues often considered by the courts of appeals, that the courts of appeals normally decide such issues only after holding an oral argument, and that the Department should therefore hold an oral argument. American requested an oral argument in its reply comments. American Reply at 28. Fort Worth later filed its own motion for oral argument.

The Department denies these requests. Parties have no due process right to an oral argument. *FCC v. WJR, The Goodwill Station*, 337 U.S. 265 (1949). The Administrative Procedure Act does not require oral arguments in agency proceedings. The Department rarely hold [sic] oral arguments. No one has shown that an oral argument in this proceeding would be useful or necessary. Moreover, no one claims that it cannot adequately present its arguments in their written comments and reply comments. Scheduling an oral argument would also delay the issuance of a decision.

The Department is unpersuaded by the DFW Board's citation of its intent to hold

an oral argument before issuing a decision on the application by American and British Airways for approval and antitrust immunity for their proposed alliance. The Department stated that that case was "an exceptional case" that involved difficult factual issues and "an enormous degree of regulatory complexity." Order 97-9-4 (September 5, 1997) at 16-17. The Department does not

believe that this case raises issues requiring an oral argument.

## MEDIATION

The DFW Board has asked the Department to act as mediators to settle the dispute. The DFW Board also asks that the Department suspend this proceeding during the mediation process. Dallas, Southwest, Continental Express, and Legend oppose this suggestion. They assert that the DFW Board is trying to delay the issuance of a ruling on the federal law issues. While mediation could be desirable later, successful negotiations would be unlikely without the issuance of the Department's interpretation of the federal statutes. Dallas additionally suggests that the Department could not appropriately act as a mediator when it may later issue an order on the legal issues presented in this proceeding.

The Department encourages the parties to settle the dispute privately. A settlement acceptable to all of the parties would be the best outcome. The parties' current positions are far apart, and the state court's efforts at mediation were unsuccessful. Since the state court has already established a mediation process, there is a forum for settlement efforts if the parties consider further discussions worthwhile.

## OTHER PROCEDURAL ISSUES

The Department determined to issue a decision promptly in this proceeding. It noted that the state and federal courts were moving toward deciding the cases next year.

Order 98-8-29 at 5. In fact, on October 15 the state court issued its decision on the summary judgment motions. The Department set a procedural schedule that gave the parties adequate time to file comments and reply comments, and it later extended that time due to requests by Fort Worth, American, and the DFW Board. Order 98-9-5. The Department sees no reason to delay this proceeding further.

American nonetheless complains that the Department have [sic] accelerated the schedule without cause. American Comments at 2. American, however, neither explains why the courts' schedules make it unreasonable to resolve the issues promptly nor shows that the comment schedule has prejudiced it.

**ACCORDINGLY:**

1. The Department of Transportation denies the motions of Fort Worth for dismissal;

2. The Department of Transportation denies the requests by Fort Worth for disclosure and abatement;

3. The Department of Transportation denies the motions for oral argument;

4. The Department of Transportation grants the motions by the City of Fort Worth and Legend Airlines to supplement the record;

5. The Department of Transportation denies the motion for mediation; and

6. The Department of Transportation grants the motions for leave to file surreplies and other unauthorized documents.

By:

**CHARLES A. HUNNICUTT**
Assistant Secretary for Aviation
And International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at http://dms.dot.gov/general/orders/aviation.html*

**APPENDIX D**

CAUSE NO. 48-171109-97

| | | |
|---|---|---|
| CITY OF FORT WORTH, TEXAS<br>Plaintiff,<br>and<br>AMERICAN AIRLINES, INC.,<br>Plaintiff Intervenor,<br>v.<br>CITY OF DALLAS, TEXAS, THE DALLAS FORT WORTH INTERNATIONAL AIRPORT BOARD, JEFFREY P. FEGAN, LEGEND AIRLINES, INC., ASTRAEA AVIATION SERVICES INC. D/B/A DALFORT AVIATION, MESA AIRLINES, INC., CONTINENTAL AIRLINES, INC., and CONTINENTAL EXPRESS, INC.<br>Defendants | § | IN THE DISTRICT COURT OF<br>TARRANT COUNTY, TEXAS<br>48TH JUDICIAL DISTRICT |

**FINAL JUDGMENT**

On October 1, 1998, the Court heard the motions for summary judgment filed by The City of Fort Worth ("Fort Worth"), American Airlines, Inc. ("American"), The City of Dallas ("Dallas"), Continental Airlines, Inc. ("Continental"), Continental Express, Inc. ("Continental Express"), and The Dallas Fort Worth International Airport Board (the "DFW Board"). All parties appeared by and through counsel of record. After considering the motions, responses, the summary judgment evidence, the

pleadings, and briefs and arguments of counsel, the Court, on October 15, 1998, signed a Partial Summary Judgment And Order and made the following findings:

F1. The April 15, 1968 Agreement ("the Agreement") between Dallas and Fort Worth and the 1968 Regional Airport Concurrent Bond Ordinance ("the Concurrent Bond Ordinance"), as described in Fort Worth's Third Amended Petition, are not pre-empted by federal law, and are valid and enforceable.

F2. Dallas and Fort Worth have agreed not to enforce the Agreement and the Concurrent Bond Ordinance insofar as it related to scheduled passenger service to or from Love Field to points within Texas and the four contiguous states, and Fort Worth does not seek to enforce the Agreement and the Concurrent Bond Ordinance with respect to scheduled passenger service within Texas and the four contiguous states.

F3. As owner of Love Field and Redbird Airports, and as co-owner of DFW Airport, Dallas is a multi-airport proprietor with a federally reserved proprietary right and power to restrict scheduled passenger service at Love Field to points within Texas and the four contiguous states.

F4. The ADA, "Wright" or "Shelby" Amendments do not convey affirmative rights which allow interstate passenger service from Love Field to points beyond Texas and its four contiguous states.

F5. No justiciable controversy exists as to Astraea Aviation Services, Inc. and Mesa Airlines, Inc.

Intervenor American Airlines, Inc. has nonsuited its claims and causes of action against defendants, the DFW Board and Jeffrey P. Fegan, and this Court has entered two (2) orders severing claims from this action and placing them into separate dockets. Defendants, Astraea Aviation Services, Inc., d/b/a Dalfort Aviation, and Mesa Airlines, Inc., have been DISMISSED from this action. Accordingly, the Court enters this Final Judgment in this action:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

D1. Dallas is obligated to prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states, including the flights proposed by Legend, Continental and Continental Express.

D2. If Dallas does not prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states, including the flights proposed by Legend, Continental and Continental Express, Dallas will breach the Agreement, the Concurrent Bond Ordinance, and the agreement referred to in F2. above.

D3. Section 9.5 of the Bond Ordinance prohibits Legend, Continental and Continental Express from offering scheduled commercial passenger service at Love Field, except within the State of Texas and the four states contiguous to Texas.

D4. The DFW Board and its Executive Director, Jeffrey P. Fegan, may not allow interstate passenger service from Love Field unless such service is restricted to

service to the four contiguous states or unless the DFW Board allows such service only after making a determination pursuant to § 9.5 of the Concurrent Bond Ordinance that such service is necessary in the interest of public safety, in the interest of prudent and efficient operations at DFW Airport, or in the interest of satisfying an overriding public need for decentralized Certificated Air Carrier Services in the Dallas-Fort Worth metropolitan area considered as a whole.

D5. All taxable costs of Court incurred herein (excluding attorneys fees) are taxed against defendants, as follows: (i) taxable costs incurred by each defendant are taxed severally to the defendant that incurred them; and (ii) taxable costs incurred by Fort Worth and American are taxed jointly and severally against defendants, Dallas, the DFW Board, Jeffrey P. Fegan, Legend Airlines, Inc., Continental Airlines, Inc., and Continental Express, Inc.

It is the intention of this Court that this is the final judgment in this action. All relief not specifically granted herein is denied.

Signed this 16 day of December, 1998 @ 10:45 a.m.

/s/ Bob McCoy
BOB McCOY,
JUDGE PRESIDING

Supreme Court, U.S.
FILED
MAY 31 2000

No. 99-1462

IN THE

# Supreme Court of the United States

THE CITY OF FORT WORTH TEXAS,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF IN OPPOSITION OF CONTINENTAL EXPRESS, INC.

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## CORPORATE DISCLOSURE STATEMENT

Continental Express, Inc. is wholly owned by its parent, Continental Airlines, Inc., which is a publicly held corporation.

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IN THE

# Supreme Court of the United States

No. 99-1462

THE CITY OF FORT WORTH, TEXAS,

*Petitioner,*

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THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## BRIEF IN OPPOSITION OF CONTINENTAL EXPRESS, INC.

Continental Express, Inc. participated in the underlying Department of Transportation ("DOT") proceeding and was a party to the proceeding in the United States Court of Appeals for the Fifth Circuit to review the DOT decision.

## COUNTERSTATEMENT OF THE CASE

The long and unusual history of disputes about airline use of Love Field airport, the federal laws governing that use, various "agreements" relating to that use, as well as the procedural history of the administrative action leading to the decision of the Department of Transportation ("DOT") are well-described in the opinion of the Court of Appeals,

Pet. App. 2-9, and DOT's orders. Pet. App. 53-81, 147-51. We do not rehearse that history in this opposition brief.

However, it is appropriate to highlight that the procedural portrayal of this case in Fort Worth's Petition is disturbing in at least one significant respect. In an effort to cast the federal agency as overreaching, Petitioner asserts thematically that the Department of Transportation decided "to commence an administrative proceeding for the sole purpose of contradicting and undermining a final judgment previously entered by a state court involving the same principal parties and issues." Pet. 5.

Petitioner's assertion is inaccurate both as a description of the federal agency's motivation and as a description of the sequence of events. The agency proceeding was initiated *before* the state court's summary judgment decision was issued. Moreover, that proceeding was begun at the request of several parties, including Fort Worth itself. DOT acted quite properly to resolve the federal law questions within its area of special expertise by commencing a proceeding *and*, after initiating that proceeding, issuing its decision notwithstanding a ruling by the state court involving only some of the parties that had an interest in the agency's decision. There is no basis for Petitioner Fort Worth's suggestion that the "sole purpose" – or any purpose – for commencing the administrative proceeding was to undermine the state court's authority. In any event, the state appellate court has now reversed the trial court's summary judgment and agreed with DOT and Fifth Circuit interpretations of the relevant statutes.

Of course, even if Petitioner's recitation about the agency's motives and the sequence of events were true, this would hardly warrant a grant of the petition. Issues concerning airline use of Love Field are matters of clear federal concern and within the special expertise of the Department of Transportation. The Department of Transportation possessed

the power to issue an order, in the public interest, that would be binding as to *all* parties and potential parties concerned. As the court below held, the agency cannot be faulted for properly exercising that power.

## REASONS TO DENY THE WRIT

Fort Worth does *not* in its petition challenge the basic authority of the Department of Transportation to resolve issues of airline use of airports such as Love Field, including issues of preemption of local authority in general and the "proprietary power" exception in particular. Instead, accepting DOT's general authority over the basic subject matter of the dispute, Petitioner presents three questions. The first two questions address whether DOT wrongly decided the "proprietary power" and "preemption" issues. The third question challenges the agency's authority to render a decision after the state trial court announced its judgment.

None of the issues warrants this Court's review or is well-presented for review by the instant petition. The longstanding and rather unique dispute involving airline use of Love Field, the novel compromises associated with resolving those disputes as well as Congress' direct involvement in the process of resolving issues relating to this particular airport (through the Wright and the Shelby Amendments) all greatly influenced the analysis of the court below. That unique history and the two specific statutes addressing the use of Love Field could well be instrumental in determining the appropriate disposition of this particular case. But the existence of those unique factors in this case would likely stand as an obstacle to using this case as a vehicle for resolving or clarifying, for example, the application of the "proprietary power exception" generally – even assuming that the Court believed this to be a matter on which the lower courts required the Court's guidance at this time. Moreover, the procedural posture of the case, arising as it does through

Fort Worth's efforts to force *Dallas* to take certain action with respect to Love Field and Fort Worth's use of a state law *contract* theory to effect that change, further complicates this case and undermines Fort Worth's effort to characterize this case as a proper vehicle for this Court to define the scope of the "proprietary powers" exception or any other issue related to preemption, the use of the nation's airports, or issues of agency claim preclusion.

### A. There Is No "Urgent Need" For This Court To Define An Airport Proprietor's Rights

Notwithstanding Petitioner's suggestion that there is an "urgent need" for the Court to "define an airport proprietor's rights," the lower courts do not seem to have experienced much difficulty in "defining" such rights on an incremental case-by-case basis. Thus, with due deference for the Department of Transportation's expertise in this field, there appears to be fair consistency in the cases addressing "proprietary rights" issues. Petitioner's effort to portray the agency decision and the decision of the court below as aberrational or out of step with the case law is unsuccessful.

In deregulating the airline industry in 1978 with passage of the Airline Deregulation Act ("ADA"), Congress plainly did *not* wish to substitute a patchwork of state or local regulation of prices, routes or service for the scheme of federal aviation regulation. Section 41713(b)(1) of the Airline Deregulation Act provides that

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1) (emphasis added). There is no question that Fort Worth was here attempting to limit airline operations in a manner "relating to . . . routes" and "service."

At the same time as it sought to preempt state and local regulations, Congress preserved the right of a "State, political subdivision of a State, or a political authority of at least 2 States that owns or operates an airport . . . from carrying out its proprietary powers and rights." 49 U.S.C. § 41713(b)(3). Thus, the rights of a state political subdivision, acting as airport proprietor, are preserved. But given the fact that state political subdivisions own or operate most airports, an expansive interpretation of proprietary rights to encompass direct regulation of "prices, routes and service" would undermine the basic preemptive purpose of the ADA and balkanize airline route and price regulation.

Ordinarily, it has not been difficult for the courts to distinguish between preempted "price, route and service" regulation, on the one hand, and "proprietary power," on the other. Many of the controversies have involved state or local efforts to limit noise or address environmental concerns.[1]

Petitioner asserts that the restrictions that it seeks to implement and enforce at Love Field are like the perimeter restrictions held to be lawful exercises of local proprietary power in *Western Air Lines v. Port Authority,* 817 F.2d 222 (2d Cir. 1987), *cert. denied,* 485 U.S. 1006 (1988), and *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The perimeter restrictions at issue in those cases, of course, were very different than what Fort Worth proposes for Love Field. In those cases, the restrictions limited the distance that might

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[1] *National Helicopter Corp. of America v. City of New York*, 137 F.3d 81, 88-89 (2d Cir. 1988); *British Airways Bd. v. Port Authority of New York*, 558 F.2d 75, 84 (2d Cir. 1977); *Santa Monica Airport Ass'n v. City of Santa Monica,* 659 F.2d 100, 104 (9th Cir. 1981).

be flown on nonstop flights to and from the airport – a "perimeter rule." Passengers were free to connect at the intermediate stop for travel to and from whatever points they chose, and the airline was free to operate flights between the restricted airport and other airports without limit so long as a stop was made within the relevant perimeter. The airline also had the ability to offer through fares and through baggage service. Fort Worth, in contrast, would limit the destinations to four contiguous states rather than to any destination within a set mileage range, prohibit flights to or from points beyond the four contiguous states, and prohibit through fares and through baggage service.

The type of restriction that Fort Worth insists upon enforcing now is, therefore, not a "perimeter" restriction, but rather a novel form of route regulation unique to Love Field. Its uniqueness stems not from some specialized local interest but rather from the fact that the genesis of the restriction is an idiosyncratic political compromise (reflected in the Wright Amendment) rather than a pure effort at airport or municipal management geared precisely to local interests.

Moreover, in both *Western Air Lines* and *City of Houston*, the airport owner had demonstrated a specific need for the restriction at issue to serve a local objective independent of its desire to limit airport use. In the instant case, a decisive factor was Petitioner Fort Worth's failure to articulate a local objective other than its desire to bolster service at another airport. The absence of evidence of any local interest independently served by the proposed restriction was fatal to Petitioner's argument in this case. Pet. App. 34-36; Pet. App. 107-108. Thus, the decision below reflects *no* disagreement with the decision of any other circuit on any point of law. Rather, the distinction between the result in this case and the results in *Western Air Lines* and *City of Houston* are based on the facts. In any event, this Court could not fairly elaborate on the nature of the local interests that are properly the

subject of the proprietary rights exception in this case, where no local interest has been suggested short of a desire to regulate routes in order to allocate flights to one airport rather than another.

The Texas state appellate court itself has now concluded that the Airline Deregulation Act preempts the bond ordinance restrictions, that enforcement of the restrictions is not a permissible exercise of proprietary powers under the Airline Deregulation Act and that the interpretation of the commuter airline exception rendered by DOT and the Fifth Circuit is correct. *Legend Airlines v. City of Fort Worth*, No. 2-99-098-CV, Court of Appeals, Second District of Texas, Fort Worth, May 25, 2000 at 30-31 (lodged with the Court).

Petitioner relies heavily on *Arapahoe County Public Airport Authority v. Centennial Express Airline, Inc.*, 956 P.2d 587 (Colo. 1998), which it says is in conflict with this case. But that case simply involved the question whether an airport proprietor could *maintain* an airport precisely as it had historically operated, without *any* scheduled passenger service.

The question whether a municipal proprietor can choose to maintain a small airport without any regularly-scheduled passenger service is plausibly viewed as a core matter of local government interest. One can easily characterize the decision whether to accommodate passenger service at an airport that has historically not had such service as a major issue of local concern, for there can be large scale implications to that decision. Thus, the Colorado courts viewed the decision whether to allow an airport to be converted to commercial passenger service uses at all as near the core of a municipality's prerogatives.

Moreover, in terms of the ADA's preemptive force, the issue whether to create a passenger airport at all would appear to be far less a matter of *route* regulation than the unique

route restriction championed by Fort Worth here. The Colorado Supreme Court in *Arapahoe* concluded that the regulation in question there was *not* a regulation of airline prices or routes "because the ban on scheduled service does not delineate what airlines can charge or where they can fly." 956 P.2d 587, 595 (Colo. 1998).

We note that the DOT's Federal Aviation Administration has concluded that the restriction at issue in *Arapahoe* is impermissible, reaching a conclusion contrary to that of the Colorado courts. *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1 (Feb. 18, 1999). That decision is currently under review by the Tenth Circuit. (*Arapahoe County Pub. Airport Authority v. FAA*, No. 99-9508) (10th Cir. filed March 10, 1999). Similarly, the Texas appellate court reviewing the Love Field litigation in Texas has concluded that "*Arapahoe* is factually distinguishable, and, to the arguable extent that it is not, we agree with the Fifth Circuit that it was wrongly decided and thus decline to follow it." *See Legend Airlines v. City of Fort Worth* at 23, n. 52.

If there arises a conflict between the federal courts and agencies, on the one hand, and the state courts, on the other, concerning Arapahoe County's regulation, we assume that the parties will seek certiorari. But there is no conflict between *Arapahoe County* and *this* case, for the nature of the regulation at issue in the two cases is starkly different.

Finally, in judging the nature of the federal interest at issue in this case, and thus the scope of the proprietary power reserved to the airport owner, both the Wright and Shelby Amendments must be given effect. Those enactments demonstrate a specific federal interest and legislative determination about the appropriate use of a specific airport that is already in operation as part of the national infrastructure of commercial airports operating in interstate

commerce. Fort Worth's approach seeks to vitiate the federal plan reflected in the Wright and Shelby Amendments and replace it with a local assertion of authority over the routes to be served at Love Field. The unique legislative background associated with the use of Love Field renders it a difficult case from which useful general guidance on the "proprietary powers" exception might emerge.

### B. The Decision Below Presents No Conflict With *Wolens*

Petitioner suggests a conflict between the decision below and this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). *Wolens* indeed holds that the Airline Deregulation Act leaves states free to enforce an "airline's alleged breach of its own, self-imposed [contractual] undertakings." *See* Pet. App. 20. As the basis for the application of that principle in this case, Petitioner cites the "Use Agreements that some, but not all, airlines serving DFW Airport have executed." Pet. App. 19. Petitioner asserts that those airlines that executed such agreements "have agreed to use DFW Airport for all their interstate flights in North Texas."[2]

*Wolens*, of course, states that "the ADA permits state-law-based court adjudication of routine breach-of-contract claims." 513 U.S. at 232. At issue in *Wolens*, however, were simply the contracts between airlines and passengers, involving the "terms and conditions airlines offer and passengers accept." *Id.* at 228. Those independent "self-imposed undertakings" were contrasted with "state-imposed obligations." *Id.* Whereas state-imposed obligations were easily regarded as regulatory in character, and thus preempted, the wholly private contracts between passenger

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[2] *Id.* Continental Express has not entered into such an agreement.

and airline were seen as "self-imposed undertakings," non-regulatory, and thus not preempted.

The breach claim at issue here hardly qualifies as a "routine breach-of-contract claim." Neither can the "Use Agreements" at issue be likened to the wholly private party agreements at issue in *Wolens*. To the contrary, the "Use Agreements" relied upon by Petitioner were between the DFW Airport Board itself and certain airlines. Among the many mechanisms available to a municipality or state subdivision to implement its regulatory objectives are contracts. The fact that the state subdivision can implement its will most effectively in some instances by acting through a contract does not change the fundamentally regulatory nature of its action.[3] Here the "agreements" were the product of a political process, paralleling an ordinance issued for the same purpose, encouraging greater use of Dallas/Fort Worth International Airport at the expense of Love Field.[4] Thus, these are *not* the type of private, contractual obligations, voluntarily undertaken by an airline, held in *Wolens* to be unpreempted, and thus enforceable under ordinary state contract law.

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[3] Not *every* municipal contract is necessarily the equivalent of a regulation, *see* Pet. App. 44, and the courts have distinguished between regulatory contracts implementing policies and contracts for services. For instance, the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999) recently construed a preemption provision identical in relevant respects to that in the ADA and held that a city's contract with a towing service was not preempted, as the city was attempting simply to procure a needed service and was not seeking to implement a regulatory policy. *See id.* at 693-95.

[4] In *Wolens* the Court adopted the principle that "States may not seek to impose their own . . . theories of competition . . . on the operations of an air carrier," *see* 513 U.S. at 229 n.5, yet that is precisely what Fort Worth seeks to accomplish by contract.

The distinction between self-imposed and state-imposed obligations "confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." 513 U.S. at 233. *See also Smith v. Comair, Inc.*, 134 F.3d 254, 257 (4th Cir. 1998). The "Use Agreements" provide that the signatory carriers conduct their services "to the extent required by the terms" of the bond ordinance entered into by the cities of Dallas and Fort Worth. Pet. App. 45. The bond ordinance, in turn, does not prohibit Love Field service, but rather provides only that the cities "take such steps as may be . . . legally permissible" to phase-out service at Love Field, Pet. App. 2-3. Interpretation of the "Use Agreements" therefore requires resort to the bond ordinance, a local law, and necessarily involves consideration of federal law limiting state and local regulation of aviation. Since the bond ordinance provides that the cities "take such steps as may be . . . legally permissible" to phase-out service at Love Field, state laws and policies external to the parties' bargain, under Fort Worth's theory, "enlarge or enhance" the parties' bargain.

The ADA's prohibition on a municipality's enforcement of any "provision having the force and effect of law" is assuredly broad enough to encompass enforcement of contracts *with* a State's political subdivision or any municipality. Even if it was not expressly preempted, the enforcement of such contracts would assuredly frustrate implementation of the federal scheme. *See Hines v. Davidowitz*, 312 U.S. 52 (1941) (preemption of state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

In Fort Worth's view, notwithstanding that a municipality would clearly *not* be permitted to bar an air carrier operating at DFW from providing service, for example, to California, that same municipality could insist that in exchange for

various services provided by the airport, that air carrier must "agree" not to provide service to California. Fort Worth's theory is untenable as a matter of law and logic, as DOT, the Fifth Circuit and the Texas appellate court have concluded.

### C. DOT Properly Issued Its Decision Notwithstanding The State Trial Court's Judgment

Petitioner apparently relies for much of the emotional force of its argument on what it portrays as the federal agency's failure to defer to a pending state court proceeding. Thus, in its third "question presented," Petitioner chides the Department of Transportation for "having failed to participate in a pending state court lawsuit," and instead initiating a proceeding and issuing a decision after the state trial court had ruled.

Yet there is no question that a federal agency has no obligation to participate as an *amicus* in any state court proceeding. Petitioner neglects to mention that it successfully *opposed* both a motion by the City of Dallas to join the Department as a party to the state court proceeding and the introduction into evidence during the state court proceedings of a June 30, 1998 letter from Nancy McFadden, the Department's General Counsel, stating the Department's position on several issues in the Love Field matter.

Moreover, a federal agency cannot plausibly be faulted for electing to initiate a proceeding and giving the matter formal consideration before rendering a comprehensive decision. *See Continental Airlines v. Dept. of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988) (affirming the Department's 1985 order issued to resolve previous disputes concerning interpretation of the Wright Amendment). Having actually initiated a proceeding and issued a formal decision, the federal agency could not very well submit its decision to the state court as if the state court were the proper court to review that decision.

Fort Worth does *not* dispute in its petition that this matter fell squarely within DOT's expertise and authority. Thus, it was entirely proper, in the first instance, for DOT to resolve the issue presented on the merits. Indeed, its views, as a federal agency charged with enforcement authority in this area of interstate commerce regulation, are to be given primacy in this field. To be sure, Petitioner deployed a state law contract theory in the state court. But given the federal agency's direct authority over airline use of Love Field, it is difficult to identify any basis in "federalism" upon which the federal agency should have deferred to the state court's jurisdiction to resolve the central issue of federal law at the core of the agency's mission. Indeed, Petitioner does not really suggest otherwise.

Instead, Petitioner suggests that federalism requires that a federal agency's duty to defer is triggered by the state trial court's issuance of a judgment.

For the reasons explained by the court below, neither 28 U.S.C. § 1738 nor any common law doctrine would support granting preclusive effect to the decision of the state trial court in these circumstances. Pet. App. 17-22. Even if there are circumstances under which a federal *agency* might give preclusive effect to a state court judgment on an issue of law within the special expertise and authority of the federal agency, those circumstances did not arise here. *Only* the federal agency could issue a ruling that would bind all potentially affected persons. Moreover, as a practical matter, it would have been untenable to afford preclusive effect to the judgment as between the parties to the state court action, leaving the remaining parties subject to an inconsistent *federal* determination.

In this case, it would have been exceptionally difficult for the agency to defer to the state court decision, if perhaps not to the judgment. The state court simply entered a judgment which embodies a conclusion. Pet. App. 178-181. It

describes no analysis to which DOT might have deferred or which might have informed DOT's own judgment. The state court simply did not discuss the issues in any useful detail.

In the first Texas decision analyzing the issues raised, the Texas state appellate court reversed the trial court and concluded that enforcement of the restrictions proposed by Fort Worth are preempted by the Airline Deregulation Act. Although the state appellate court concluded that the trial judge was not required to defer to DOT, it also concluded that DOT's decisions were entitled to "controlling weight." *See Legend Airlines v. City of Fort Worth* at 25, 29. Thus, the apparent conflict between state and federal decisions has now been resolved by the state appellate court's decision.

## CONCLUSION

The petition for issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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(3) (2)

Nos. 99-1462 and 99-1745

Supreme Court, U.S.
FILED
MAY 31 2000
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In The

# Supreme Court of the United States

CITY OF FORT WORTH, TEXAS,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

AMERICAN AIRLINES, INC.,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the "proprietary powers and rights" exception to complete federal preemption under the Airline Deregulation Act of 1978 authorizes the City of Dallas, as owner of Love Field, to deny access to Love Field for flights specifically authorized by subsequent federal statutes?

2. Whether litigation in a state court involving some but not all of the parties to a controversy, and some but not all of the issues in dispute, can prevent a federal agency from interpreting a federal statute which it is charged with administering?

## PARTIES TO THE PROCEEDING

The following is a list of parties that participated in the proceeding in the United States Court of Appeals for the Fifth Circuit.

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*Miscellaneous*

Mr. George A. Linskie
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## RULE 29.6 STATEMENT

Respondent Southwest Airlines Co. is a corporation whose stock is publicly traded. It has no parent company and no publicly traded company owns 10% or more of its outstanding stock.

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## BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondent Southwest Airlines Co. ("Southwest") respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner City of Fort Worth, Texas ("Fort Worth") in Cause No. 99-1462, and in opposition to the Petition for a Writ of Certiorari of American Airlines, Inc. ("American") in the related Cause No. 99-1745. The sole question presented by American in its petition is also one of the three questions in Fort Worth's petition. Southwest will deal in this Brief with both parties' statements of that common issue, as well as one of the additional questions raised by Fort Worth.

## STATUTORY PROVISIONS

The relevant statutory provisions appear in the Appendix to this Brief beginning at page 1a. Those provisions are:

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 906-192, 94 Stat. 35, 48 (1980) [the Wright Amendment];

2. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) [the Shelby Amendment];

3. Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 22 Stat. 1705 (1978), codified at 49 U.S.C. § 41713(b); and

4. 28 U.S.C. § 1738.

## STATEMENT OF THE CASE

As Southwest has noted in its Response to the Cross-Petition for a writ of certiorari filed by the Dallas-Fort Worth International Airport Board ("DFW Airport Board") in this matter, Cause No. 99-1739, the decisions of the Department of Transportation and the Fifth Circuit now at issue do raise one legitimate question for consideration here – the upsetting by the action below of the carefully crafted scheme of Congress for the distribution of air service in North Texas by the authorization of single-ticketing out of Love Field in Dallas for flights beyond the congressionally prescribed Love Field Service Area. However, one of the very reasons making that question appropriate for resolution here – the significant and explicit involvement of Congress in the management of interstate air traffic out of Love Field – makes this case unsuited for the attention of this Court on the matters presented by the other petitioners.

Specifically, what American calls "the single important issue presented by the decision below"[1] – preemption of local authority by the Airline Deregulation Act of 1978 (the "ADA") – is particularly inappropriate for a general consideration in the context of Dallas and Love Field. For, not only was the matter correctly decided by the Department of Transportation ("DOT") and the Fifth Circuit, it was decided in the context of the most congressionally overseen and directed municipal airport in the country. Some general resolution of the "proprietary powers" issue or some overarching statement of this

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[1] Petition of American Airlines, Inc. for a Writ of Certiorari, Cause No. 99-1745, p. 3 (Am. Pet. 3).

Court on preemption by the ADA, even if the first were thought possible or the second desirable at this time, could not come out of the Dallas situation, given its unique statutory history.

Similarly, the issue which Fort Worth seeks to raise in its Question 3, having to do with preclusion in federal agency proceedings, does not warrant consideration by this Court, both because of the correctness of the decisions below and the particular history of the litigation at issue.[2]

Because the legislative and judicial background against which the DOT and the court of appeals acted is so important for understanding both the correctness of those decisions and their limited impact on other situations, a review of the history of Love Field is appropriate.

## I. THE LOVE FIELD LITIGATION

In 1968, after years of sparring over which local airport should be designated to serve the needs of the Dallas-Fort Worth region, the Cities of Dallas and Fort Worth agreed to construct a *new* Dallas-Fort Worth Regional Airport ("DFW") midway between the two cities. For that purpose the cities adopted a Regional Airport Concurrent Bond Ordinance (the "Bond Ordinance"), Section 9.5A of which provided that the Cities:

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[2] Fort Worth's second question for review concerns a matter – the "use agreements" by which certain carriers other than Southwest committed to fly exclusively out of DFW – on which Southwest took no position before the DOT, in the Fifth Circuit or in its Response in Cause No. 99-1739, and on which it takes no position here.

> . . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective *phase-out at Love Field,* Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services,* and to transfer such activity to the Regional Airport effective upon the beginning of operations at the Regional Airport.

*City of Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015, 1020 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (emphasis added). In 1970, the principal airlines then serving the Dallas-Fort Worth area signed agreements to serve DFW Airport, and in 1974 moved all their flights from Love Field and other local airports to the newly-opened DFW Airport. 371 F. Supp. at 1020-21.

On June 18, 1971, Southwest Airlines began service as an intrastate airline certificated by the Texas Aeronautics Commission, serving routes from Dallas Love Field to Houston and San Antonio, Texas. In October 1971, Southwest advised the DFW Airport Board that it did not intend to serve DFW. Dallas, Fort Worth and the DFW Airport Board subsequently filed a lawsuit in federal court, seeking a declaration of their right under federal and state law to exclude Southwest from Love Field. Southwest counterclaimed, seeking a declaration of its right under federal and state law to remain at Love Field.

In an exhaustive opinion, the district court resoundingly rejected the position of the cities and the DFW Airport Board that they could exclude Southwest from Love Field. Relying on both federal and state law

grounds, the court ruled that Southwest's Love Field service could not be barred by Section 9.5 of the Concurrent Bond Ordinance and that "the exclusion of Southwest Airlines from Love Field would not be legally permissible." 371 F. Supp. at 1035. The Fifth Circuit affirmed this decision on the state law grounds, finding it unnecessary to reach the federal questions; and this Court denied certiorari. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 777 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).[3]

As a consequence of the federal court decisions, Southwest operated out of Love Field, as an intrastate carrier, during most of the 1970's. In 1978, however, Congress passed the Airline Deregulation Act, Pub. Law 95-504 (1978), dramatically liberalizing the route entry and pricing freedom of commercial air carriers. In January 1979, Southwest filed an application with the U.S. Civil Aeronautics Board ("CAB") for authority to fly between Dallas (Love Field) and New Orleans under the Automatic Market Entry ("AME") provisions of the Airline Deregulation Act. Fort Worth, Dallas, the DFW Airport Board, American Airlines, Congressman Jim Wright (then House Majority Leader and representative from Fort Worth), and others acting in concert with them filed objections to Southwest's application with the CAB. However, the CAB awarded Southwest permanent

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[3] This defeat did not deter the Cities of Dallas and Fort Worth, the DFW Airport Board, or the DFW air carriers from other efforts to expel Southwest from Love Field. Each attempt, however, was rebuffed by the federal courts. *See, e.g., Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

authority in the Dallas (Love Field) – New Orleans market in 1979. Order 79-6-187, CAB Dockets 33777, *et al.* (June 28, 1979).

## II. PASSAGE OF THE WRIGHT AMENDMENT

Their failure before the Civil Aeronautics Board prompted the Dallas/Fort Worth parties to turn to Congress, in an effort to change the law and to restrict service at Love Field. Majority Leader Wright offered an amendment to an unrelated aviation bill under consideration by the House, which would have *prohibited*, as a matter of federal law, *all commercial interstate air service* at Love Field. The Senate failed to agree to this amendment, however, and the matter was referred to a conference committee.[4] After lengthy negotiations, a legislative compromise was struck. This legislation, known as the Wright Amendment (Section 29 of the International Air Transportation Competition Act of 1979, Public Law 96-192), was described by the Conference Committee as "a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years." Senate Conference Report No. 96-531, 96th Cong. 1st Session, at 24.

Subsection (a) of the Wright Amendment prohibited (except as provided in subsection (c) of the Amendment) the federal government from authorizing any interstate service at Love Field, except for a small quota of charter

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[4] *See* discussion in the Department of Transportation's *Love Field Amendment Proceeding*, Order 85-12-81 at 3 (December 31, 1985) (DFW Airport Board Pet. App. 11), *aff'd, Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988).

flights and an allowance for commuter air carriers operating aircraft with no more than 56 seats. Subsection (b) allowed Southwest to continue its existing interstate (New Orleans) service at Love Field, but prohibited airlines from offering other interstate services at Love Field except as specifically authorized by the Wright Amendment.

Subsection (c) carved out an exception to the ban on interstate service from Love Field involving planes with more than 56 seats. In subsection (c), Congress found it "consistent with the public convenience and necessity to authorize" carriers to provide service on planes of any size, including large jets, between Love Field and points in the four states contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico). This authorization was made subject to two additional restrictions, to ensure that airlines could not evade the law's intent to maintain Love Field as a "short-haul" airport. Under the Wright Amendment, subsection (c), an air carrier can offer the interstate service within the designated five state area provided: (1) the air carrier does not offer through service or ticketing with another air carrier; and (2) the air carrier "does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside [the five-state service area]."

## III. PASSAGE OF THE SHELBY AMENDMENT

For almost 18 years the Wright Amendment governed and dictated the permissible air service from Love Field. The constitutionality of the Wright Amendment was upheld by courts of appeals as a legitimate exercise of the plenary power of Congress to regulate interstate

commerce. *Kansas v. United States*, 16 F.3d 436 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991).

As an act of Congress, however, the Wright Amendment was subject to modification by that body. In 1997, Senator Richard Shelby of Alabama, Chairman of the Senate Appropriations Committee, added an amendment to an otherwise unrelated aviation appropriations bill (the "Shelby Amendment"), which expanded the permissible geographic scope of service from Love Field to include three additional states: Kansas, Alabama, and Mississippi. The Shelby Amendment also modified the Wright Amendment to define the term "passenger capacity of 56 passengers or less" to include large aircraft (300,000 pounds or less gross weight), reconfigured to accommodate 56 or fewer passengers. Public Law 105-66, § 337 (1997). The Shelby Amendment became law on October 27, 1997.

## IV. FORT WORTH'S LAWSUIT

Promptly after Congress passed the Shelby Amendment (but before the President signed it), the City of Fort Worth filed suit in the 48th Judicial District Court of Tarrant County, Texas seeking a declaratory judgment that the City of Dallas was contractually obligated to Fort Worth to prevent any air carrier from taking advantage of the Shelby Amendment. In addition to the City of Dallas, Forth Worth joined as defendants in Texas state court certain air carriers that were viewed as potential users of Love Field. It did not join the DOT, the agency responsible for administering the Wright and Shelby Amendments; nor did it join Southwest, the primary air carrier

at Love Field. Indeed, when certain of the defendants sought to add Southwest and the DOT to the proceeding as necessary parties, Fort Worth and the Intervenor Plaintiff American Airlines, Inc. succeeded in having them stricken from the suit.[5]

On October 15, 1998, the state district court granted a partial summary judgment for Fort Worth and its litigation allies, American Airlines and the DFW Airport Board, against Dallas, Continental Express, Inc. and Legend Airlines, Inc. In a brief order that did not include a supporting opinion, the court ruled that Dallas was obligated by the 1968 Concurrent Bond Ordinance to bar airlines at Love Field from operating additional services authorized by the Shelby Amendment and that federal law did not override the cities' agreement to restrict Love Field service. On December 16, 1998, the court made its judgment final. *See* FW Pet. App. 178.

On May 25, 2000, the Court of Appeals for the Second District of Texas at Fort Worth reversed the judgment of the district court and rendered a judgment denying the declaratory relief sought by the City of Fort Worth and American Airlines.[6] The state court of appeals held, in agreement with the Fifth Circuit here, that the restrictions on Love Field air passenger service contained in the Bond Ordinance are preempted by the ADA.

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[5] Volume 10 of the Record on Appeal 110.

[6] The Judgment of the Court of Appeals for the Second District of Texas at Fort Worth in Cause No. 2-99-098-CV, *Legend Airlines, Inc., et al. v. City of Fort Worth, et al.* appears in the Appendix to this Brief at page 5a.

## V. THE DOT PROCEEDING BELOW

In August 1998 while Fort Worth's lawsuit was pending, the DOT instituted the *Love Field Service Interpretation Proceeding*, in order to "issue a ruling on the major federal law issues raised by the dispute" in the state court proceeding. DOT Order 98-8-29 at 1, August 25, 1998. The Department explained that, as the agency primarily responsible for administering the relevant statutes, it had a responsibility to rule on the federal issues underlying the Texas litigation, much as the Department had done in 1985 in the *Love Field Amendment Proceeding, supra*, n.4. The Department therefore requested comments from interested parties on five issues of federal law. Fort Worth Petition Appendix [FW Pet. App.] 53, 80-81. DOT Orders 98-8-29 and 98-9-5 (September 3, 1998).

On December 22, 1998, after receiving a large volume of comments by the parties who are now before this Court, as well as by other interested parties, the Department ruled on the five issues as follows:

> (1) The City of Dallas' proprietary powers as owner of Love Field do not allow it to bar air carriers from operating services authorized by the Shelby Amendment, and thus Fort Worth may not enforce contractual claims against Dallas that would force it to do otherwise.
>
> (2) Under the federal aviation preemption provision, the Wright and Shelby Amendments preempt any agreement between Dallas and Fort Worth to restrict air service at Love Field that is permitted by those Amendments.
>
> (3) The Shelby Amendment allows an airline to operate long-haul service from Love Field with

any aircraft having no more than 56 seats, including regional jets.

(4) The DFW use agreements may not be enforced to block a DFW signatory airline from offering interstate service at Love Field that is permitted by the Wright and Shelby Amendments.

(5) The Wright Amendment permits Continental Airlines and its subsidiary Continental Express to offer through service and ticketing from Love Field to points outside Love Field service area via Houston, so long as their flights from Love Field to Houston use aircraft with 56 seats or less.

*See* Order 98-12-27 (FW Pet. App. 53, 145-46).

The City of Fort Worth and the DFW Airport Board petitioned the DOT for reconsideration of its rulings on Issues One through Four. With respect to the question of preemption by the ADA and the Wright and Shelby Amendments, Fort Worth and the Airport Board argued that the DOT was precluded from deciding the question by the contrary summary judgment decision of the state district judge in the Fort Worth lawsuit. The DOT rejected this argument and issued an Order on Reconsideration that affirmed its prior rulings.[7]

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[7] The Order on Reconsideration, No. 99-413, is publicly available at 1999 WL 218767 (D.O.T.). It is also reprinted in the Appendix to the Petition for a Writ of Certiorari filed by American Airlines, Inc. at 128a.

## VI. THE FIFTH CIRCUIT DECISION

Various of the parties to the DOT proceeding petitioned the United States Court of Appeals for the Fifth Circuit challenging some or all of the decisions on the five issues.[8] In its decision, the Fifth Circuit denied all of the petitions for review and affirmed the DOT Orders. *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir. 2000) (FW Pet. App. 53). The court of appeals considered and rejected the arguments of the City of Fort Worth, American and the DFW Airport Board that either the full faith and credit statute, 28 U.S.C. § 1738, or federal common law rules of preclusion foreclosed the DOT's consideration of the ADA or of the Wright and Shelby Amendments. 202 F.3d at 799-800 (FW Pet. App. 17-23). On the issue of the preemption of Section 9.5A of the Bond Ordinance, the Circuit held that the restrictions on Love Field operations imposed by that section constitute regulations which relate to routes, within the meaning of 49 U.S.C. § 41713(b)(1), the federal preemption provision of the ADA. 202 F.3d at 805 (FW Pet. App. 33). The court then held that, under the circumstances of Love Field and the DFW Airport, the Bond Ordinance ban on Love Field flights went beyond any exercise of proper local proprietary powers that had ever been upheld in the federal case law, 202 F.3d at 807 (FW Pet. App. 37), and that it was a preempted exercise of local regulation over interstate air routes. 202 F.3d at 808 (FW Pet. App. 38-39).

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[8] Southwest filed a petition in the Fifth Circuit seeking review of the DOT's decision on Issue Five – single-ticketing. That question is a subject of the DFW Airport Board's Cross-Petition in No. 99-1739.

With respect to the effect of the Wright and Shelby Amendments on the power of the City of Dallas to regulate interstate air travel at Love Field, the court of appeals held it unnecessary to consider whether those statutes "impliedly preempt the cities' ability to enforce the Ordinance," having found express preemption under the ADA. 202 F.3d 808, n.17 (FW Pet. App. 39).

## ARGUMENT

### I. THE FIFTH CIRCUIT CORRECTLY DECIDED THE ISSUE OF ADA PREEMPTION.

It is elementary that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." *Western Air Lines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952, 955 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), quoting *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1010 (2nd Cir. 1977). Even before passage of the ADA, with its express preemption of local regulation of "price, route, or service,"[9] it was recognized that

> . . . the airport operator is circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest. The Court must "carefully scrutinize all exercises of local powers under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals."

[9] 49 U.S.C. § 41713(b)(1).

*Western Air Lines*, 658 F. Supp. at 958, *quoting British Airport Board*, 564 F.2d at 1011 (2nd Cir. 1977).

In the ADA, this concept of limited local authority was made explicit in Section 4(a)(1) and (3), which preempted state and local regulations relating to price, route or service of interstate air transportation, while recognizing the existence of traditional local "proprietary powers and rights." In the federal cases decided since enactment of the ADA, the exercise of those proprietary powers has been limited to cases of noise regulations, other legitimate environmental concerns, or demonstrated and documented situations involving groundside congestion of airports. *See, e.g., Alaska Airlines, Inc. v. Long Beach*, 951 F.2d 977, 984 (9th Cir. 1991) (allowing noise restrictions which did not "disfavor interstate commerce" and where benefits were not "illusory or insignificant"); *San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991) (disallowing noise restrictions as unjustly discriminatory, and noting that the FAA's interpretation of what constitutes unjust discrimination "will be upheld unless it is unreasonable"); *Western Air Lines v. Port Authority of New York and New Jersey, supra* (allowing 1500 mile perimeter rule at LaGuardia Airport, imposed by multi-airport proprietor,[10] in the interest of regulating ground congestion at the airport);[11] *Midway Airlines, Inc. v. County of*

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[10] Dallas is the proprietor of Love Field. It does not occupy a similar status with respect to DFW. *See* 202 F.3d 808, n.16 (FW Pet. App. 38).

[11] Contrary to the assertion in American's Petition (Am. Pet. 14), the rationale for the *Western Air Lines* decision was clearly the local interest in alleviating ground congestion. This is quite clear in the Second Circuit decision, which noted that the perimeter rule had been adopted "in order to reduce ground

*Westchester*, 584 F. Supp. 436 (S.D. N.Y. 1984) (allowing hourly limit on number of scheduled flights in light of compelling factual evidence of overcrowding of terminal). As the Second Circuit recently observed, an airport proprietor "may regulate only a narrowly defined subject matter – aircraft noise and other environmental concerns at the local level." *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998).

The Fifth Circuit's decision below is squarely within this tradition of the case law. Moreover, the court of appeals was careful to note that it was not attempting to chisel the list of proprietary rights in stone, holding that

> [t]he fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive. . . . We do not limit the scope of proprietary rights to those which have been previously recognized.

202 F.3d at 808 (FW Pet. App. 38).

Accordingly, the court of appeals was "open to assessing whether the restrictions in the Ordinance are

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congestion at LaGuardia." 817 F.2d at 222. The court then explained the reasoning that lead to the conclusion that a short-haul airport would have less congestion:

> The Authority believes that business travelers create considerably less airport congestion than vacationers and uses the perimeter rule to encourage the use of LaGuardia by business people, who often make relatively short trips. . . . *Id.*

Nothing in this decision conflicts with the Fifth Circuit's decision below. The Fifth Circuit does not deny the validity of a congestion-based restriction. 202 F.3d at 807 (FW Pet. 37). No one, however, has offered that as a reason for the restrictions on Love Field use in the Bond Ordinance.

reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest." *Id.* However, those parties who now urge this Court to review the decision below because of its supposed dire consequences for the country as a whole, were unable to suggest to the Circuit a single good reason under the particular circumstances of this case for recognizing the power of a city to set routes as Fort Worth proposed that Dallas do.[12] *Id.*

In its Order 98-12-27, the DOT considered one possible justification for local restrictions on service, and in so doing struck at the heart of American's whole argument on the significance of the decision below. Just as in its petition to this Court, so in its DOT submissions, American argued that, if the Bond Ordinance could not be enforced to impose greater restrictions on Love Field air service than those authorized by federal law, it would

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[12] Proprietary powers may only be exercised by the actual airport proprietor. *See, e.g., City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973) (city noise ordinance by non-proprietor city preempted); *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles,* 979 F.2d 1338 (9th Cir. 1992) (neighboring city had no authority to regulate airport of which it was not proprietor); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306, 1317 (9th Cir. 1981) (the entity which is the "owner, operator, and promoter" of the airport is its proprietor, and is the exclusive holder of whatever proprietary powers exist). An airport operator may not, as here, contract with a second airport proprietor to limit operations allowed by federal law at its own airport for the purpose of restricting competition. This would allow competing airport proprietors, by contracting to divide markets and restrict airline competition, to create an entire new class of "proprietary powers," borne exclusively of the desire for economic protectionism.

"frustrate efforts by other cities to create regional airports, efforts which assertedly require restrictions on airline service at existing airports." Order 98-12-27 (FW Pet. App. 92-93).

The answer to American's argument, given by the DOT in its Order, is also the answer to that same argument as made in American's Petition for a Writ of Certiorari. As the DOT noted,

> American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport. *CF. City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

Order 98-12-27 (FW Pet. App. 93).

American's only response to this entirely reasonable approach by the agency responsible for implementing federal aviation policy has been to express consternation that the reasonableness of a 1968 restriction should be judged in terms of present conditions. American has bemoaned this "shifting-sands ruling" (Am. Pet. 26), and asserted that it will undermine the certainty necessary for financing.

First, it should be noted that the evaluation by the DOT in 1998 of a restriction imposed in *1968* is more a matter of glacial movement than shifting sands. Financing in every enterprise is undertaken in light of the governing statutory framework, and that framework has existed under the ADA since at least 1978. The law even before deregulation required that all restrictions by an airport owner be reasonable;[13] and it is hardly reasonable to adopt American's rubric: When the reason for the rule ceases, the rule should go on anyway.

Analyzing the condition of DFW, now more than twenty-five years old and enjoying phenomenal success,[14] in terms of either a start-up airport or a failing one is ludicrous. Neither the DOT nor the Fifth Circuit made any decision that would foreclose local restrictions by a proprietor in the interest of a second start-up airport in an area, or that would prevent reasonable restrictions to save a failing established airport. Indeed, both are on record as suggesting the contrary proposition. Order 98-12-27 (FW Pet. App. 93); 202 F.3d at 808 (FW Pet. App. 37-38). However, those issues are not raised by this case

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[13] The DFW Airport has, in fact, flourished in the face of a string of federal court decisions, going back nearly thirty years, which have held that the Bond Ordinance cannot legally be enforced to exclude air service at Love Field as contemplated by its terms. The first such decision, recognizing Southwest's right to continue flying out of Love Field, came before DFW had even opened. *City of Dallas v. Southwest Airlines, Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

[14] In 1997, DFW had 60.5 million enplaned passengers, while Love Field had 3.4 million. FW Pet. App. 112 (Order 98-12-27).

and would be before this Court only as a matter of speculation.

As to the necessity of resolving the "conflict" between the decisions below and the decision of the Colorado Supreme Court in *Arapahoe County Public Airport v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), it is certainly true that the Fifth Circuit was concerned by the language of the Colorado opinion. Specifically, the court of appeals expressed the "fear that under the rationale of *Arapahoe*, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception" to preemption under the ADA.[15] However, the Circuit also noted that *Arapahoe* was distinguishable from the present case. In the Colorado action, the court did not find the local airport restriction to be a regulation of "rates, routes or service," while clearly the Fifth Circuit did in the case here. Moreover, in *Arapahoe*, the local authority was enforcing a restriction on a kind of aircraft that had never used the airport in question in the first place. Love Field, the court of appeals noted in contrast, has always accommodated passenger planes of all types. 202 F.3d at 807, n.15 (FW Pet. App. 36-37).

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[15] 202 F.3d at 807 (FW Pet. App. 36). Subsequent to the decision of the Colorado Supreme Court in *Arapahoe*, the Federal Aviation Administration ruled, upon the complaint of Centennial Express Airlines, that the restrictions at issue in that case were, among other things, preempted under the ADA. *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05 (August 21, 1998) (*aff'd*, FAA Order No. 1999-1, February 18, 1999), *petition for review pending* as No. 99-9508 (10th Cir. filed March 10, 1999). Any consideration by this Court of the issues raised by *Arapahoe* should come in the context of the decision of the Tenth Circuit.

Finally, as American itself notes, the decision in *Arapahoe* came in the context of restrictions involving Denver's *new* International Airport (Am. Pet. 12). The decision on Love Field came after more than a quarter century of operations out of the now well-established DFW International Airport. It also came after extensive federal legislation governing with great precision the permissible interstate flights out of Love Field.

Accordingly, *Arapahoe* and this case, however unlike in spirit, are distinguishable cases. Moreover, the unique character of Love Field, most particularly the specific attention accorded it by Congress in the Wright and Shelby Amendments, makes the present case a very poor choice should this Court be inclined to issue general instruction on the proper spirit to adopt in considering federal aviation preemption.

## II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE COURT'S CONSIDERATION OF THE SCOPE OF ADA PREEMPTION, BECAUSE OF THE UNIQUE ATTENTION OF CONGRESS TO LOVE FIELD.

At least with respect to the geographical scope of service described in subsection (c) of the Wright and Shelby Amendments, it is clear that Congress intended to occupy the field entirely, and to prescribe the precise air service which could be provided from Love Field. Congress' specific determination of this issue leaves no room for a more restrictive limitation by the City of Dallas. This conclusion is supported by the words of the Wright and Shelby Amendments themselves; by published legislative

history; and by the historical context in which the Amendments were adopted.

Subsection (c) of the Wright Amendment constitutes an affirmative *grant* of authority ("it is found consistent with the public convenience and necessity to authorize . . . "). As the Conference Report on the Wright Amendment specifically stated with respect to subsection (c):

> Subsection (c) provides that the CAB, or its successor agency is empowered to authorize an airline to provide service only between Love Field and points in Louisiana, Arkansas, Oklahoma, and New Mexico on a turnaround basis. The section also contains a congressional finding that such service, and only Love Field service of this limited scope, is consistent with the public convenience and necessity. While specific route applications to provide this service will be passed on by the CAB, the conferees intend that the Board will consider only whether the applicant is fit, willing and able to perform the proposed transportation, and whether such transportation is within the scope of authority granted by this legislation. We anticipate that the Board will act expeditiously on any such applications.

Senate Conference Report No. 96-531, 96th Cong., 1st Session, at 25.

With respect to the balance between federal preemption and local proprietary powers, the Wright Amendment Conference Report went on to state:

> The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively,

> apply to the authority to serve Love Field on interstate flights authorized by the amendment.

Id. at 26. This language evidences a congressional intent to maintain the existing balance between the sections on preemption and proprietary powers insofar as they would affect operations at Love Field; and it makes the historical context of the rulings on Love Field service especially pertinent.

Some three months before the Wright Amendment was agreed to, the Civil Aeronautics Board had specifically decided how the preemption/proprietary powers balance must apply with respect to Love Field:

> D/FW, supported by American, argues that, in the exercise of its proprietary rights, confirmed by section 105(b)(1) of the Act, it may, in effect, veto certification of Southwest at Love Field. That argument is simply without merit. . . . Section 105(b)(1) was not intended to give airport operators additional proprietary rights, let alone veto power over Board decisions.

CAB Order 79-9-192 at 8-9 (Sept. 28, 1979).

Thus, in specifically authorizing service between Love Field and points within Texas, Louisiana, Arkansas, Oklahoma, and New Mexico, Congress understood that the exercise of proprietary powers could not be used "in effect, [to] veto certification of Southwest at Love Field." Congress could not have intended that its explicit finding that such service is "consistent with the public convenience and necessity" might be subject to review, modification, or rejection by a local airport proprietor. Indeed, if Dallas had the power in the exercise of its proprietary rights to deny access to Love Field for service authorized

by the Wright Amendment, there would have been no reason for the statute in the first place. For at the time of the Amendment, Dallas was in favor of no scheduled flights out of Love Field.[16]

When the 105th Congress undertook to amend subsection (c) of the Wright Amendment by adding the states of Kansas, Alabama, and Mississippi, it evidenced no intention to reduce the preemptive power of the affirmative grant of authority to provide service between Love Field and points within the designated states. The legislation itself states simply:

> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

Public Law 105-66, § 337(b). The Shelby Amendment Conference Report is similarly brief and straightforward with respect to the modification of subsection (c):

> In addition, the conferees have added bill language including additional states to be covered under section 29(c) of the International Air Transportation Competition Act of 1979.

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[16] The Fort Worth parties attempt to avoid the obvious preemptive force of the Wright Amendment, which governed Love Field operations for nearly 18 years, by the bizarre argument that this act of Congress was really nothing more than a private agreement, a means of settling lawsuits, and, in effect, a novation of the original Bond Ordinance agreements. Federal statutes, of course, apply whether one has agreed to them or not.

Congressional Record, October 7, 1997, at H8603, H.R. Conf. Rep. No. 105-313 (1997).

In enacting this modification of subsection (c) in 1997, the 105th Congress did nothing to imply that it intended its actions to be any less preemptive than were the actions of the 96th Congress in enacting the original version of subsection (c). On the contrary, Congress' intent on both occasions was consistent: A carrier meeting the requirements of subsection (c) may provide service between Love Field and the states specified therein, without hindrance from the City of Dallas, the City of Fort Worth, the DFW Airport Board, or anyone else proclaiming themselves to be exercising "proprietary powers."

Given this unique situation involving Love Field, in which the proprietors' rights are specially and specifically restricted by targeted acts of Congress setting out restrictions and authorizations relevant to no other airport in the country, this case appears especially unsuited for the broad rulings called for by the petitioners here. The decision of the DOT that Dallas cannot forbid what the Shelby Amendment authorizes is correct for reasons in common with other airport situations – ADA preemption and the necessity of currently reasonable rules. But it is also correct for reasons peculiar to this one place. Those factors must inevitably be read together.

## III. THE DOT HAD THE LEGAL AUTHORITY TO HOLD ITS INTERPRETATION PROCEEDING AND TO ISSUE DECLARATORY RULINGS ON THE QUESTIONS RAISED.

On May 25, 2000, the state district court summary judgment which Fort Worth argues should have precluded the DOT decision below was reversed and judgment was rendered by the Texas state court of appeals in entire agreement with the DOT and the Fifth Circuit on the pre-emption issue. Accordingly, if the DOT is bound by the Texas state court determination in Fort Worth's lawsuit, as Fort Worth argues here, it is now bound to decide against Fort Worth. This fact may well lessen petitioner's enthusiasm for preclusion. Certainly it is beyond question that the DOT had the authority to institute the proceeding below and to decide the federal law issues raised. As the District of Columbia Court of Appeals observed in reviewing the Department's previous administration of the Wright Amendment:

> Naturally, the administration and enforcement of a statute call upon the agency charged with its execution to interpret it.
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> * * *
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> Here, Congress fashioned a specific provision which the agency (once CAB, now DOT) has been called upon to interpret.

*Continental Air Lines, Inc. v. Department of Transportation*, 843 F.2d 1444, 1449 (D.C. Cir. 1988). This view is consistent with the teaching of this Court that "the Department of Transportation has regulatory authority to enforce the federal aviation laws." *Northwest Airlines, Inc. v. County of*

*Kent, Michigan*, 510 U.S. 355, 371 (1994). For the Department to hand over administration of a federal statute regulating air transportation to a state district court would turn principles of federalism, comity, and separation of powers on their heads.[17] Nevertheless, Fort Worth, alone in this Court, argues that the DOT was compelled either by the full faith and credit statute, 28 U.S.C. § 1738, or by federal common law rules of preclusion to follow the summary judgment decision of the Fort Worth state district court denying the applicability of federal preemption.[18]

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[17] See, for example, the recent Director's Determination in *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05 (August 21, 1998), (*aff'd*, FAA Order No. 1999-1, February 18, 1999) at page 3:

> As an expert administrative agency, the FAA (along with the Secretary of Transportation (Secretary) in connection with certain economic issues) is charged with interpreting and implementing the Federal aviation statutes . . . Moreover, Federal courts, including the Supreme Court, have recognized the unique expertise of the FAA and the Secretary in interpreting the Federal statutory provisions at issue. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987); and *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994). The FAA is not bound to follow the reasoning of the Colorado Supreme Court's decision and has conducted a *de novo* review of the matters raised in the complaint.

[18] Accordingly, were the Court to agree with Fort Worth now, the case would go back to the DOT, which would be compelled to enter precisely the same order it did in the first place on the basis of the state court of appeals judgment.

Fort Worth first asserts that, once the state district court had issued its Final Judgment on December 16, 1998, the DOT was required to defer to that judgment under 28 U.S.C. § 1738, a statute which requires federal *courts* to give the same full faith and credit to a state court judgment as would the courts of that state. Of course, by its terms this statute is inapplicable to the proceeding below and did not bar the DOT from issuing its Declaratory Order. The statute applies to "federal courts" rather than federal agencies. *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3d Cir. 1991) ("federal administrative agencies are not bound by section 1738 because they are not 'courts' "). Further, even if the statute did apply, it would not have given preclusive effect in the federal agency proceeding to the state court judgment, because that judgment is not binding on all interested parties under Texas law. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996) (the decision of a state court can have no more preclusive effect in any federal proceeding than it would have in a state action).

Neither the DOT nor Southwest was a party to the state court proceeding, nor were they in privity with any party; and thus they would not be bound by the state court's judgment under Texas law. *See, e.g., Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983). In fact, the state district court *denied, at the urging of Fort Worth,* motions to join Southwest Airlines and the DOT to the state court action on the grounds that they were not "persons who have or claim any interest that would be affected by the declaration."[19] Thus, no

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[19] Volume 10 of the Record on Appeal 110.

interest of Southwest Airlines could have been adjudicated and foreclosed in that state court proceeding to which it was not a party. Certainly, it makes no sense to hold that a federal agency should be crippled in the task of administering the laws placed in its charge by Congress as the result of litigation with limited impact even within its own jurisdiction.

In light of the important federal interests at stake in the administration of the aviation laws, the court of appeals declined to hold common law preclusion applicable either. Nothing in the cases cited by Fort Worth argues for a contrary result. Indeed, the four cases cited by Fort Worth in support of something like a full faith and credit requirement for state decisions in federal agency proceedings[20] only demonstrate how far Fort Worth is off the mark.

*Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18 (1st Cir. 1997), concerns the preclusive effect of a state workers' compensation agency determination on the extent of an employees' disability in a subsequent federal claim for workers' compensation benefits under the Longshore Act. *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), is the Second Circuit's rejection of the FCC's attempt to use federal courts as screening panels for its disputes. The Circuit held that the FCC was bound by a prior *federal* court judgment, which was itself based on the res judicata effect of a state court suit. *Deerfield* is a decision made on the basis of Article III considerations which have nothing to do with the present dispute. 992 F.2d at 428. *Midgett v. United States*, 603 F.2d 835 (Ct. Cl.

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[20] FW Pet. 22.

1979), considered the effect of a state court adjudication of death on the Army's obligation to pay death benefits. Similarly, in *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), the issue was the effect on the award of Social Security benefits of a Puerto Rican court's determination of paternity.

In all of the three cases – *Bath Iron Works*, *Midgett* and *Torres* – that could be considered even remotely relevant here, the state tribunals were acting on traditional state law issues. They were deciding the extent of injury, the fact of death, and paternity. They were not attempting to interpret federal statutes, nor was anyone proposing that they could preclude the relevant federal agencies from administering and interpreting their statutes in proceedings involving other parties. Indeed, as the court acknowledged in *Midgett*:

> A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court.

603 F.2d at 845.

Requiring the DOT to defer to decisions of state courts as Fort Worth argues would overturn years of orderly administration of the federal aviation laws and invite a Balkanizing of aviation decision-making through state and local court judgments. Such an outcome would turn long-established principles of federalism upside-down and wreak havoc with the centralized federal oversight that is essential for our national aviation system.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of a Certiorari of American Airlines, Inc. should be denied and the Petition for a Writ of Certiorari of the City of Fort Worth should be denied with respect to Questions 1 and 3.

Respectfully submitted,

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1. *The Wright Amendment.* Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
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> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.
>
> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight

between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

2. *The Shelby Amendment*. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94

Stat. 48 et. seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".

3. *Airline Deregulation Act*. The pertinent paragraphs of Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), as now codified at 49 U.S.C. § 41713(b), are as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
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> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

4. *28 U.S.C. § 1738*. Section 1738 of 28 U.S.C. provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-99-098-CV

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| Legend Airlines, Inc.; City of Dallas, Texas; Continental Airlines, Inc.; and Continental Express, Inc. | § | From the 48th District Court of Tarrant County (48-171109-97) May 25, 2000 Opinion by Chief Justice Cayce Dissent by Justice Dauphinot (p) |
| v. | § | |
| City of Fort Worth, Texas and American Airlines, Inc. | § | |

## JUDGMENT

This court has considered the record on appeal in this case and has determined that there is error in the trial court's judgment. We, therefore, order that the judgment of the trial court be reversed and that judgment be rendered denying the declaratory relief requested by appellees City of Forth Worth, Texas and American Airlines, Inc.

We also render judgment that the commuter airlines exception to the Shelby Amendment allows any airline operating any aircraft with a capacity of no more than 56 passengers and a gross weight of no more than 300,000 pounds to offer flights on that aircraft to or from Love Field without geographical limitation.

It is ordered that the appeal from the temporary injunction brought by Continental Airlines, Inc. and Continental Express, Inc. be dismissed.

It is further ordered that appellees City of Fort Worth, Texas and American Airlines, Inc. shall pay all of the costs of this appeal, for which let execution issue.

/s/

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(4) (3)

Nos. 99-1462 & 99-1745

Supreme Court, U.S.
FILED
MAY 31 2000
CLERK

In The

# Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

* * *

AMERICAN AIRLINES, INC.,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT LEGEND AIRLINES, INC.'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. Whether The Fifth Circuit Decisions (I) That The Airline Deregulation Act Preempted An Alleged Agreement Between The Cities Of Dallas And Fort Worth To Restrict Service At Love Field, And (II) Whether The Proprietary Powers Exception 49 U.S.C. § 41713(b)(3) Does Not Allow Dallas To Impose Route Limiting Restrictions, Did Not Conflict With Other Courts Of Appeal?

II. Whether The Court Should Deny Fort Worth's Petition Because DOT Has Authority To Administer And Interpret Federal Laws Pertaining To Aviation And Neither 28 U.S.C. § 1738 Nor Common Laws Rules Of Issue Preclusion Bind DOT To A State Court Decision To Which It Was Not A Party?

## LIST OF INTERESTED PARTIES

The petition accurately lists the parties to this proceeding.

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## STATEMENT OF CASE

### I. Introduction

For over 30 years, a handful of parties have attempted to prevent airline competition in the Dallas-Fort Worth marketplace. Fortunately for the people of Texas and across the nation, these parties failed in their multiple attempts to destroy Southwest Airlines. The anti-competitive campaign, however, continues as Petitioners fight to keep another new entrant carrier from operating.

If the single most important question in this case is as American Airlines, Inc. ("American") claims "whether the Airline Deregulation Act of 1978 ("ADA") preempts the authority of local governments to implement regional plans that allocate particular types of air traffic to specific airports," the answer is simply, yes. The ADA preempts local authorities from implementing plans that regulate "price, route, or service of an air carrier" with limited exceptions for an airport proprietor. Courts have consistently held that proprietary powers and rights are extremely narrow and require numerous factors to be met before specific and reasonable limited restrictions are allowed. Not only do Petitioners fail to demonstrate the requisite need for imposing restrictions, the type of restriction they seek, to limit airline service from Love Field to Texas and four contiguous states to prevent competition, is prohibited under all circumstances and is significantly more onerous than restrictions found at any other airport in the world. Petitioners' untenable argument that airport proprietors can restrict the routes, number of passengers on an aircraft, and whether airlines can offer connecting

flights, would usurp the authority of the ADA and wreak havoc on the national aviation system.

## II. Relevant Facts

For many years, the cities of Dallas and Fort Worth each operated a local airport and fought over which airport should be the area's principal airport. In 1968, Dallas and Fort Worth agreed to create Dallas-Fort Worth International Airport ("DFW") as the metropolitan area's primary airport. As a part of their agreement, Dallas and Fort Worth jointly passed a bond ordinance, the 1968 Regional Airport Concurrent Bond Ordinance ("Bond Ordinance"), to fund DFW. In the Bond Ordinance, the cities agreed to take "legally permissible" steps to phase out "certificated air carrier" service at other airports in the area, including Love Field. They did not try to close the airport. They did not form a single authority to operate both DFW and Love Field. Instead, a new airport board was created to govern DFW, while the City of Dallas remained the sole proprietor of Love Field. When Southwest Airlines, then an intrastate-only airline, refused to move to DFW, Dallas and Fort Worth sued to require Southwest to move to DFW.[1] Ultimately the case -

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[1] Those parties were trying to force Southwest to take the specific suicidal step of abandoning Love Field and moving to DFW, where American Airlines could "deal" with it.

> Southwest employees knew they were fighting for their survival. The battle over Love Field was a life-and-death situation for Southwest; had it been forced to move to DFW, it would have gone bankrupt. Southwest employees knew it, the cities of Dallas and

was heard by the United States Court of Appeals for the Fifth Circuit, which decided that Southwest had a federally declared right to the continued use of and access to Love Field despite the cities' arguments that this would violate their agreement. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974).

In 1978, Congress deregulated the airline industry by enacting the ADA, which divested the states and their political subdivisions of the power to economically regulate airlines. The ADA did this by barring states or local governments from enforcing any "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1).[2] After passage of the ADA, Southwest

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Fort Worth knew it, and the other airlines knew it. Kevin Freiberg & Jackie Freiberg, *Nuts! Southwest Airlines' Crazy Recipe for Business and Personal Success* 27 (1996).

[2] The ADA also instructed the Secretary to consider the following matters as being in the public interest:

- Placing maximum reliance on competitive market forces and on actual and potential competition
- Avoiding unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation
- Encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry

49 U.S.C. § 40101(a).

initiated interstate service at Love Field. Concluding that the ADA preempted Fort Worth and Dallas from enforcing a provision in the Bond Ordinance designed to prohibit interstate service at Love Field, the U.S. Civil Aeronautics Board ("CAB") granted Southwest the authority to offer interstate service. *Southwest Airlines Automatic Market Entry Investigation*, CAB Docket 34582, Initial Decision (June 28, 1979), Order 79-9-129 (September 28, 1979). Unable to block competitive services through the courts, American Airlines, Dallas and Fort Worth asked Congress to restrict Southwest operations to only intrastate service. Consequently, House Speaker Jim Wright of Fort Worth introduced a bill that would ban any airlines operating at Love Field from flying outside of Texas. Congress rejected this extremely limiting proposal to limit Love Field only to intrastate service and instead passed the International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35 (1980) (the "Wright Amendment") that authorized: 1) flights on any type aircraft within Texas and its four contiguous states, Louisiana, Arkansas, Oklahoma, and New Mexico; and 2) flights to any airport on "aircraft with a passenger capacity of 56 passengers or less." In addition, it restricted the number of charter flights, through ticketing and certain advertising. Without this specific Congressional action enacting the Wright Amendment, no restrictions on air carrier operations would exist at Love Field. Carriers would be able to fly anywhere.

To address the importance of expanded airline competition, in 1997, Congress enacted the Shelby

Amendment, which amended the Wright Amendment.[3] The Shelby Amendment added three additional states (Mississippi, Alabama, and Kansas) to the four contiguous states service limitation, and clarified the meaning of the 56-passenger authority by specifying that airlines may provide unrestricted interstate service in aircraft reconfigured to carry no more than 56 passengers[4] as long as the aircraft does not exceed the gross aircraft weight of 300,000 pounds.[5]

American misleads the Court by claiming that the Bond Ordinance declares:

> Love Field not available as a point of origin or destination for scheduled long-distance flights, just as if Love Field did not exist . . . [n]o airline would operate long-distance flights from Love Field, and all could operate short-distance flights.

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[3] Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, § 337, 111 Stat. 1425 (1997).

[4] Congress considered a number of possible limitations on the proposed expanded operations at Love Field, including whether the cities should be able to have any control over Love Field expansion. The Congressional conference committee rejected a provision that would give Dallas authority to veto any new authority operated under the Shelby Amendment, as well as a proposal to provide the Fort Worth City Council with similar veto authority.

[5] Although Congress could have limited 56-seat jet aircraft to turboprops, or specifically excluded regional jets, it did not adopt these approaches. Instead, Congress chose a weight limit that includes the aircraft to be operated by Legend along with larger aircraft.

(American Pet. 24.) Contrary to American's statement that Dallas "has held Love Field open only for short distance flights within Texas and four contiguous states" (American Pet. 24), the Shelby Amendment expanded the Love Field service area to seven states and acknowledged that jets with restricted seating could be utilized to serve any market. Clearly, the service area restrictions and the 56-passenger authorization are in place because Congress put those restrictions on Love Field, not because of Dallas' proprietary rights. The Bond Ordinance does not contain any operational restrictions. It does not mention limiting flights nor does it mention short distance versus long distance flights. The only restrictions at Love Field are those imposed by the Wright and Shelby Amendments.

Under the authority of the Wright and Shelby Amendments, Legend Airlines, a start-up airline, proposed to offer service from Love Field to any airport in the country with jets reconfigured to seat no more that 56 passengers.

Before the President signed the Shelby Amendment into law, Fort Worth filed a lawsuit in Texas state court asking the court to render a judgment that Dallas must ban the types of interstate service at Love Field expressly authorized by the Wright and Shelby Amendments. Fort Worth, American and DFW sought to block service at Love Field proposed by Legend and Continental Express. Even though Fort Worth, DFW and American claimed that Legend's and Continental Express's proposed operations under the Shelby Amendment are not permitted,

they have not challenged operations initiated by Southwest under the authority of the Shelby Amendment.[6] Fort Worth, American and DFW do not explain how Southwest is able to operate its new "through ticketing" flights allowed by the Shelby Amendment while all other operations under that same statute are blocked.[7] The only explanation of how Southwest's Shelby Amendment service is permitted is found in the following article from The Dallas Morning News (December 3, 1997), "Crandall drops through ticketing opposition at Love":

> The head of American Airlines, Inc. indicated that the airline no longer opposes "through ticketing" from Dallas Love Field.

Apparently, American believes that it can decide which provisions of federal law it will accept and which flights are permitted at Love Field.

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[6] Upon passage of the Shelby Amendment, Southwest:

> began offering for sale connecting service between Love Field and both Jackson, Mississippi and Birmingham, Alabama. In addition, the Shelby Amendment has allowed Southwest, for the first time, to offer for sale service between Lubbock, Texas and Birmingham; between Amarillo, Texas and both Jackson and Birmingham; and between Midland-Odessa, Texas and Birmingham. This service was not previously available because the flights serving Lubbock, Amarillo, and Midland-Odessa all stopped at Love Field, because through and connecting service could not be offered beyond Texas and the four states contiguous to Texas.

Southwest Brief 13, *American Airlines v. Department of Transportation*, No. 99-60008, July 19, 1999.

[7] American has claimed that the Shelby Amendment was not valid because local parties did not agree to it. (Letter, July 6, 1998).

Petitioners' reluctance to take on Southwest is due in part to a court order arising out of a 15-year litigation campaign against Southwest. Petitioners have been bound since 1982 by a federal district court injunction that prohibits them from litigating in any other court "the validity, effect or enforceability of the 1968 Regional Airport Concurrent Bond Ordinance of the City of Dallas insofar as it may affect the right of [Southwest] to the continued use of and access to Love Field . . . "[8] That injunction, to which Petitioners agreed, was designed to end the years of litigation Petitioners and others had unleashed upon Southwest concerning its refusal to move its operations from Love Field to DFW when the airport opened in 1975. For years, Southwest was forced to fight an extremely costly legal battle (similar to Legend's current battle) on several fronts, in order to exercise its federally assured rights. The federal district court, seeking to bring closure to the issue of Southwest's right to operate at Love Field (which was previously upheld by that court in 1973 and affirmed by the Fifth Circuit in 1974, with certiorari denied in December 1974), stated in no uncertain terms that piecemeal litigation of the issue would no longer be tolerated. Instead, because the efforts of Petitioners and others were deemed to subject Southwest to "multiplicitous and further vexatious litigation" and to adversely affect Southwest's "finances, customer and business relationships, and shareholder interests," the court ordered that it, and it alone, would be the

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[8] *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678, 684 (N.D. Tex. 1975).

proper forum for any and all further litigation of the issues affecting Southwest's rights. *Id.*

It is therefore not surprising that Petitioners attempted to narrowly tailor their requested relief so as to avoid implicating the operations of Southwest, although they failed in their effort. The relief requested in the state court proceeding did directly affect, and in fact sought to preclude, Southwest's right to offer "through ticketing" from Love Field to Mississippi and Alabama – service that Southwest began immediately after the enactment of the Shelby Amendment. The state court's December 16, 1998 final judgment decreed that Dallas was "obligated to prohibit scheduled interstate passenger service to or from Love Field to points beyond the four contiguous states," and it made no exception for the through ticketing service Southwest had by that time been offering for months.[9]

In 1998, several parties in the Texas litigation now before this Court asked DOT for assistance in settling the dispute. Because the resolution of the Texas state court case depended on the interpretation of federal aviation laws, and because DOT is charged with administering these laws, on August 25, 1998, DOT instituted a public interpretive proceeding to resolve the disputed issues. All parties fully participated in the four month interpretive proceeding. Fort Worth, American and DFW submitted approximately 45 documents (over 1000 pages) to the Department during this process.

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[9] *City of Fort Worth v. City of Dallas, et al.*, 48th District Court, Tarrant County, Texas, No. 48-171109-97.

On December 22, 1998, after notice and opportunity for comments by all affected parties, DOT issued rulings on the federal law questions and various procedural issues raised by the parties. DOT held that federal law barred Dallas from imposing the kind of route restrictions on Love Field flights sought by Fort Worth, American and DFW:

> an airport owner's ability to restrict the type of service operated at its facilities is limited in that any such restrictions must be non-discriminatory, reasonable, and based on a showing that they are necessary to achieve legitimate airport goals. The Fort Worth parties have made no showing that the restrictions they wish to impose on Love Field meet this standard.

(Pet. App. 105.)

Fort Worth, American and several other parties petitioned the Fifth Circuit for review of DOT's orders. The state court temporarily stayed its proceeding pending the Fifth Circuit's decision. On February 1, 2000, the Fifth Circuit affirmed DOT's orders on all grounds. The Fifth Circuit held that it was:

> open to assessing whether the restrictions in the Ordinance are reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest. The Fort Worth petitioners fail, however, to offer a viable alternative justification for the route limitations that might support extending the recognized scope of a proprietor's powers under sec. 41713(b)(3). To allow enforcement of the Ordinance under the proprietary powers exception extends that exemption beyond its intended limited reach.

(Fort Worth Pet. App. 38.)

Fort Worth petitioned that decision to this Court on March 3, 2000. On April 5, 2000, Legend initiated service at Love Field. On May 1, 2000, American commenced Love Field service and filed its petition with this Court. Continental Express is scheduled to start Love Field-Cleveland service on June 1, 2000. At the same time, DFW operations continue to grow.

On January 27, 2000, the federal government filed suit against American and Fort Worth to enforce DOT Orders and to prevent them from interfering with operations authorized by the Wright and Shelby Amendments. In its Motion for Summary Judgment, the government stated:

> Fort Worth and American nevertheless continue to seek to impose restrictions on service at Love Field through the Texas state courts. In the past few months, their immediate goal has been to prevent Legend from commencing its planned operations from Love Field. This activity directly violates DOT's Order. Since the filing of this suit and the issuance of the Fifth Circuit's opinion, Fort Worth and American continue to violate DOT's order. Specifically, neither Fort Worth nor American has sought to dismiss or withdraw their state court suit, although they have had ample opportunity to do so, and Fort Worth continues its active involvement in the state court litigation. Accordingly, the federal plaintiffs bring this action pursuant to 49 U.S.C. §§ 46106 and 46107 to enforce DOT's Order. Plaintiffs specifically seek a permanent injunction barring American and Fort Worth from continuing to prosecute the state court litigation

> and directing them to dismiss or withdraw their state court complaint.

Memorandum in Support of Plaintiff's Motion for Summary Judgment. No. 3:00cv238-r. U.S. District Court, Northern District of Texas, Dallas Division (April 3, 2000).

Meanwhile, the Texas state district court judge ignored the ongoing DOT proceeding and all DOT documents addressing Love Field authorities and rendered a decision approximately one month after the interpretation proceeding was initiated. In a partial summary judgment opposed by Dallas (among others), the state court ruled that federal law did not preempt Dallas' ability to enforce an alleged agreement by local parties to restrict service at Love Field.

On May 25, 2000, the Court of Appeals for the Second District of Texas, Fort Worth reversed the lower court's decision holding that the ADA preempted the Bond Ordinance and that it was not within Dallas' proprietary rights to regulate routes at Love Field without legitimate justifications.[10] The court also found that Legend's and Continental Express's operations were authorized by the Wright and Shelby Amendments.

> Appellees argue that the courts in *Western Air Lines* and *City of Houston* approved route restrictions that are similar to the restrictions at issue here. Those restrictions, however, were not upheld to limit competition between airports, but because the airport proprietors had demonstrated that the restrictions were necessary to achieve legitimate airport goals – the prevention of congestion, "harsh environmental effects,"

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[10] *Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV.

and to prevent the shut down of operations at a neighboring airport. In contrast, there is no showing here that the Bond Ordinance restrictions are necessary to further any legitimate operational or safety goal, or to maintain the financial viability of DFW.[11]

## REASONS FOR DENYING THE WRIT

### I.

**The Fifth Circuit Decisions (I) That The Airline Deregulation Act Preempted An Alleged Agreement Between The Cities Of Dallas And Fort Worth To Restrict Service At Love Field, And (II) That The Proprietary Powers Exception 49 U.S.C. § 41713(b)(3) Does Not Allow Dallas To Impose Route Limiting Restrictions, Did Not Conflict With Other Courts of Appeal.**

The Fifth Circuit's decision does not conflict with the Second Circuit or deviate from its earlier decision in *City of Houston v. Federal Aviation Administration, et al.*, 679 F.2d 1184 (5th Cir. 1982). Petitioners' assertions to the contrary are inaccurate. Petitioners fail to demonstrate that the Love Field service area restrictions are a permissible exercise of proprietary rights.

The ADA's preemption provision set forth in 49 U.S.C. § 41713(b)(1), is expansive and must be interpreted "broadly." *Trujillo v. American Airlines, Inc.*, 938 F. Supp. 392, 393 (N.D.Tex. 1995), citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). Under the ADA, a state or political subdivision "may not enact or enforce a

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[11] *Id.* at 23-24.

law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . . " This Court has recognized that the purpose of the broad prohibition in Section (b)(1) is to "ensure that States would not undo federal deregulation with regulation of their own." *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995). There is, however, a very limited exception to the preemption provision for proprietary powers. Proprietary powers may be the basis for limited restrictions only if such restrictions are "reasonable, non-arbitrary and nondiscriminatory." *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 222 (2d Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). It is inconceivable that any court would find a restriction that in certain directions limits operations to within 250 miles and also limits the number of passengers on each flight, through ticketing, charter flights, advertising and that intended to prevent airline competition, to be reasonable. Such limitations run contrary to the clear meaning of the ADA.

In the interpretive proceeding, DOT concluded that restrictions agreed to by Dallas and Fort Worth were preempted by the ADA and were not valid exercises of proprietary rights. The Fifth Circuit affirmed DOT's interpretation of the preemption provision and held that Section (b)(1) preempted any agreement by the cities to restrict service. The only proprietary interest served by such a burdensome restriction is the financial interests of Fort Worth, DFW, and American Airlines, which is not the type of proprietary power exempted from the preemption provision.

There are only two cases in which Circuit courts have upheld perimeter rules, *Western Air Lines* and *City of Houston*, and neither one of these cases conflicts with the decision reached in the present case. In fact, both cases serve to distinguish acceptable proprietary interests from those articulated by Petitioners. The differences between the Love Field service area and the perimeter rules at Ronald Reagan Washington National Airport ("National") and LaGuardia are glaringly apparent. In neither case did the Circuit courts hold that an airport proprietor could restrict service to "prevent" competition. Rather, *City of Houston* and *Western Air Lines* support the finding that Dallas may not implement the perimeter and aircraft size restrictions sought by Petitioners. For Petitioners to claim that National and LaGuardia perimeter rules are "virtually identical" to Congressionally mandated restrictions at Love Field is without basis in fact and law. (American Pet. 17.)

Other than the Bond Ordinance which required the phase out of service to the extent "legally permissible," no party has identified any other "agreement" between Dallas and Fort Worth restricting service at Love Field. Fort Worth refers to "the four state perimeter rule" (Pet. 11) as if there existed another restriction other than the Wright Amendment to limit service to Texas and the four bordering states. There is not. If such an "agreement" existed, neither Fort Worth nor its partners have described when and where it was modified to permit Southwest's operations under the Shelby Amendment.

In *City of Houston*, the Fifth Circuit found that the perimeter rule imposed by the Federal Aviation Administration ("FAA") at National was permissible in part

because the FAA, as an arm of the federal government, does not fit within the restrictions of Section 105 of the Federal Aviation Act, which removes control over routes, etc., from local airport proprietors. Furthermore, the court held, on independent grounds, that the FAA, as a multi-airport proprietor, had sufficient proprietary interest to justify the perimeter rule. Because the FAA is not governed by the same rules as a local proprietor, and because the FAA is a multi-airport proprietor, Fort Worth's reliance on this case is misguided.

As a proprietor of both National Airport and Dulles, the FAA justified a 1000-mile[12] perimeter rule that required nonstop long-haul flights to use Dulles International Airport ("Dulles"). This was done to control severe congestion problems at National Airport and to help the then floundering, underutilized Dulles.[13] As the Fifth

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[12] The perimeter rule was originally 650 miles; it was twice expanded and is now 1,250 miles. In the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Congress has decided to allow some flights beyond 1,250 miles.

[13] In attacking the National Airport 1,000 mile perimeter rule (before it was expanded to 1,250 miles), American in comments submitted to FAA argued that the rule was arbitrary by stating:

> The proposed rules impose substantial costs on the economy, the public and upon the airlines, and do so in a discriminatory manner. Under the perimeter rule, citizens from states outside the perimeter are deprived of nonstop access to National and forced to incur costs, accounting to hundreds of millions of dollars in total.

(September 22, 1981)

Circuit noted, "one could shoot off a cannon in the Dulles terminal at midday without a chance of hitting anyone." (*City of Houston*, 679 F.2d at 1191.) Such is not the case at DFW, one of the nation's busiest airports.

In addition, in implementing and adjusting the perimeter rule, the FAA solicited and received comments from the "public, members of Congress, federal agencies, state, municipal and local agencies, public organizations, private companies and interested individuals before it imposed its rule." *Id.* at 1188. If Petitioners believe that the "perimeter" rule applicable at National Airport serves as precedent for creation of a limitation at Love Field, they should note that the National Airport rule is codified in federal law (49 U.S.C. Section 49109). This section states:

> An air carrier may not operate an aircraft nonstop in air transportation between Ronald Reagan Washington National Airport and another airport that is more than 1,250 statute miles away from Ronald Reagan Washington National Airport.

Additionally, Congress again modified the National Airport perimeter rule when it recently enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("FAIR-21"), which allowed additional flights beyond the perimeter. The National Airport

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> There is no rational basis for this discrimination among cities, many of which compete vigorously with one another to attract business locations, conventions and vacation travel.

(May 19, 1981)

"perimeter" limitation is not mandated by local agreement or by a multi-airport authority but is controlled by federal law, as the Wright and Shelby Amendments control operations at Love Field.

In *Western Air Lines*, the district court upheld a 1500-mile perimeter rule[14] imposed by the Port Authority of New York and New Jersey at LaGuardia[15] made necessary by severe ground congestion at LaGuardia. 658 F. Supp. at 952. As a result of congestion on the ground and in the terminal, the Port Authority required that flights over 1500 miles were required to utilize John F. Kennedy International Airport ("JFK"), a then under-utilized airport, or Newark Airport. The court held that as a multi-airport proprietor of LaGuardia, Newark, and JFK, the Port Authority could, under its "extremely limited" proprietary powers, regulate ground congestion at its airports as that "would appear to be at the core of the proprietor's function as an airport." 658 F. Supp. at 956-97. Furthermore, the court noted that it must carefully scrutinize all exercises of local power to determine whether they are reasonable, non-arbitrary and non-discriminatory, to ensure that "impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals." *Id.* at 1019, *citing British Airways Bd. v. Port Authority of New York and New Jersey*, 564 F.2d 1002,

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[14] With a number of cities outside the perimeter grandfathered, including Denver.

[15] The rule contained no restrictions on aircraft size, number of seats, prohibition on through ticketing or advertising.

1011 (2nd Cir. 1977). Restricting service at Love Field, as the Petitioners would like to do, would inhibit the legitimate national goal of competition.

On appeal, the Second Circuit affirmed the perimeter rule as permissible "at least when enacted by a multi-airport proprietor." 817 F.2d at 226. This hardly supports Fort Worth's bold assertion that an asymmetrical perimeter rule (limited to 250 miles in some directions) with various other restrictions to ***prevent competition*** "fall squarely within the proprietary rights exemption." (Fort Worth Pet. 15.)

More recently, the Second Circuit held that a proprietor of a Manhattan heliport could impose restrictions on helicopter operations to regulate noise levels but could not regulate helicopter flight paths. *National Helicopter Corp. v. City of New York*, 137 F.3d 8 (2nd Cir. 1998). An airport proprietor may restrict service at an airport only by showing that the restrictions are necessary to carry out a legitimate goal, are not arbitrary, and are reasonable. *See National Helicopter Corp.*, 137 F.3d at 89; *British Airways Board* at 1011. The Second Circuit found that the proprietary power exception "gives no authority to local officials to assign or restrict routes." 137 F.3d at 92.

The Second and Fifth Circuit have never established a rule as broad as Fort Worth and American suggest that would permit airport proprietors to protect a dominant airport from any competition. Rather the Fifth Circuit noted that:

> [the] Second Circuit upheld only the restrictions that were aimed at reducing noise or other environmental concerns at the heliport. Significantly,

> the court struck down the restriction on sightseeing routes, finding that "Congress, the Supreme Court, and we have consistently stated that the law controlling flight paths through navigable airspace is completely preempted." *Id.* at 92.

Unlike the situation presented in *Western Air Lines* and *City of Houston*, where the multi-airport proprietors sought to reallocate some traffic from their thriving and congested airports to underutilized airports, Petitioners seek to impose an unreasonable and discriminatory perimeter rule at Love Field to protect the nation's second largest airport, DFW, and one of the world's largest carriers, American Airlines, from economic competition at the smaller airport.[16] The Fifth Circuit properly determined that Petitioners' rationale for seeking to block service at Love Field was not supported by the above cases.

In neither *Western Air Lines* nor *City of Houston* was there a limitation of aircraft weight and number of passengers allowed on aircraft. The only aircraft size and weight limitations imposed at National and LaGuardia Airports are imposed by the FAA, in its role as the federal agency responsible for safety and air traffic.

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[16] Some parties have referred to the four state service area as a "perimeter rule." Perimeter rules have historically been defined by exact mileage restrictions (1,250 mile National Airport Rule and 1,500 mile LaGuardia Airport perimeter rule). The Wright Amendment restrictions are uneven, varying from approximately a 250 mile perimeter rule to the east and north to a 700 mile perimeter to the west. In addition, the Love Field restrictions limit the number of passengers on each aircraft and the size of aircraft.

As support for their position that an airport proprietor can bar certain service to prevent competition between airports, Petitioners also erroneously rely on the Colorado Supreme Court's decision in *Arapahoe County Public Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). First, the issue in *Arapahoe* was whether the airport authority could prohibit scheduled air carrier service out of Centennial Airport, a reliever airport that had never before had scheduled passenger service. Consequently, the airport was not equipped to handle passengers as it did not have a terminal, baggage system, or passenger security system. *Id.* at 590. The question before the Colorado Supreme Court, whether a municipality must open an airport to scheduled service, is not at all analogous to Love Field. Love Field has accommodated scheduled air service for over 30 years on aircraft of all sizes, including Air Force One.

Moreover, in *Arapahoe*, the court found that the airport authority "is not regulating airline fares or routes because the ban on scheduled service does not delineate what airlines can charge and where they can fly." *Id.* at 595. Thus, *Arapahoe* does not support Petitioners' contentions that Dallas can determine where airlines can fly. Nowhere does *Arapahoe* state that "[r]estricting classes of service at an airport, on the basis that does not discriminate among airlines, is part and parcel of a proprietor's right to control the size of its airports." (American Pet. 13.)

To the extent that *Arapahoe* expanded the scope of proprietor's rights in holding that the airport authority could proscribe scheduled passenger service, the FAA has

challenged the decision and determined that it was erroneously decided. *Centennial Express Airlines, et al. v. Arapahoe County Public Airport Authority*, FAA Order No. 1999-1. Consistent with DOT rulings and the Fifth Circuit decision, the FAA found that the airport proprietor does not have the authority to force scheduled service airlines to use Denver International Airport instead of Centennial Airport. (The FAA's order is currently under review in the Tenth Circuit. *Arapahoe County Public Airport Authority v. FAA*, 10th Cir. No. 99-9508.)

Because no conflict exists among the Circuit courts and Courts of Appeals, this Court should deny American and Fort Worth's Petitions for a Writ of Certiorari.

## II.

**The Court Should Deny Fort Worth Petition Because DOT Has Authority To Administer And Interpret Federal Laws Pertaining To Aviation And Neither 28 U.S.C. § 1738 Nor Common Laws Rules Of Issue Preclusion Bind DOT To A State Court Decision To Which It Was Not A Party.**

As an initial matter, it is necessary to clarify Fort Worth's misleading statements that imply that DOT "relitigated" a case after it received an unfavorable decision in state court. Although Fort Worth would like the Court to believe that DOT instituted the interpretation proceeding **after** the Texas state court rendered a decision, such is not the case. DOT instituted the interpretation proceeding following numerous requests by the parties for guidance in Love Field issues while the state trial court proceeding (to which it was not a party) was pending. The state court erroneously failed to recognize

DOT's primary jurisdiction in aviation regulation, an area in which the Fifth Circuit noted "federal concerns are preeminent and where DOT is charged with representing those concerns." (Pet. App. 21.)

Moreover, on May 25, 2000, the Court of Appeals for the Second District of Texas, Fort Worth reversed the state court decision upon which Fort Worth relies. *See Legend Airlines, Inc. v. City of Fort Worth*, No. 2-99-098-CV. The Fort Worth Court of Appeals held that the ADA pre-empted the bond ordinance, that it was not within Dallas' proprietary rights to regulate routes at Love Field without legitimate justifications (which were not articulated by Fort Worth, American or DFW) and that Legend's and Continental Express's operations are authorized under the Wright and Shelby Amendments.

### A. The Supremacy Clause Prohibits Fort Worth From Gaining Advantage By Obtaining A Friendly State Court Judgment As A Means Of Usurping Federal Authority Over Aviation Matters.

The attempts of Fort Worth, DFW and American to wrest control over air carrier operations through local litigation fails (except as an improper and expensive delay tactic) because it violates the Supremacy Clause of the U.S. Constitution. *See* U.S. CONST. art. VI, cl.2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby . . . "). Under the Constitution, any state law that frustrates or conflicts with the lawful objective of a federal statute must yield. *See United States v. Composite State Bd. of Med. Examiners*, 656 F.2d 131, 135 n.4 (5th Cir. 1981).

The Supremacy Clause protects efforts by federal agencies to administer and oversee the implementation of federal statutes. *See, e.g., NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320-21 (3d Cir. 1991). In fact, federal supremacy is particularly vital when applied to the ADA because the ADA's broad preemption provision effectuates Congress' goal of ensuring that local governments do not "undo federal deregulation with regulation of their own." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

Federal aviation policies and regulations are matters of particular federal concern. *See New England Legal Foundation v. Massachusetts Port Auth.*, 883 F.2d 157, 175 (1st Cir. 1989). The national aviation system cannot function without uniform and nationwide oversight by DOT. *See New England Legal Foundation*, 883 F.2d at 171, 175. Moreover, the ADA's goals of fostering competition for the benefit of the traveling public cannot be accomplished in a balkanized patchwork of local regulations and interests. *See* 49 U.S.C. § 40101(a)(4), (9), (10), (13), (14). DOT thus occupies the unique role of ensuring that competition works without undue local interference. *Morales*, 504 U.S. at 378.

Because of DOT's Congressionally delegated authority to administer and enforce federal policies related to aviation, including policies fostering competition, its decisions regarding the Shelby Amendment, Wright Amendment, and the ADA must supercede any contrary decision by a state court. *See Midgett v. United States*, 603 F.2d 835, 845 (Ct. Cl. 1979). The state court has no authority over federal aviation policy. *See American Mannex Corp. v. Rozands*, 462 F.2d 688, 690 (5th Cir. 1972). Under

the Supremacy Clause, DOT properly initiated, considered, and concluded the interpretation proceeding, without regard to the pending lawsuit in Texas.

### B. The Full Faith And Credit Statute And Common Law Rules Of Issue Preclusion Do Not Bind DOT To A State Court Decision To Which It Was Not A Party.

Under 28 U.S.C. § 1738, a federal court is required to give full faith and credit to a state court ruling. This Section of the Code does not apply to federal agencies. *See NLRB v. Yellow Freight Systems*, 930 F.2d at 320 (giving preclusive effect to state judgments would compromise agency's uniform enforcement of federal policies). Cases cited by Fort Worth on Section 1738 and common law issue preclusion are distinguishable from the present case.

In support of its assertion that Section 1738 should apply to federal agencies, Fort Worth wrongly relies on *Bath Iron Works Corp. v. Director, OWCP*, 125 F.3d 18 (1st Cir. 1997) and *Town of Deerfield v. FCC*, 922 F.2d 420 (2nd Cir. 1993). Although the court in *Bath Iron Works* explained that the policy arguments for applying 28 U.S.C. § 1738 to both federal courts and federal agencies tend to be the same, the reasoning of the case focuses on a federal agency giving preclusive effect to a state agencies' prior decisions. To support this conclusion, the court cited a number of cases holding that a federal agency is normally bound to respect findings by another agency acting within its competence. The agency/agency relationship present in *Bath Iron Works* is not present here.

Furthermore, in *Bath Iron Works*, the court explained that "the point of collateral estoppel is that the first determination is binding not because it is right, but because it is first – ***and was reached after a full and fair opportunity between the parties to litigate the issue.***" *Id.* at 22 (emphasis added). DOT was not a party to the state court action and therefore, the Fifth Circuit's decision not to give preclusive effect to the Texas state court judgment was consistent with the policies underlying the doctrines of collateral estoppel and *res judicata*.

Similarly, Fort Worth mistakenly argues that the decision in *Deerfield* supports the proposition that Section 1738 should apply to federal agencies. First, the Second Circuit held that the FCC was bound by a prior *federal* court judgment, not a *state* court judgment. Second, the *Deerfield* court explained that "to accord full faith and credit to a given state-court judgment, the subsequent court must give a prior state court judgment the same preclusive effect as would be given that judgment under the law of the State in which judgment was entered." *Id.* at 429. Implied in this conclusion is the assumption that the party against whom estoppel is sought had a full and fair opportunity to litigate the issue in state court.

DOT properly declined to give the state court judgment preclusive effect. As the Fifth Circuit held:

> [t]o allow the state court effectively to foreclose the administering agency from further consideration of the Shelby Amendment as to the parties which appeared before the state court would trump the key federal interests that motivated

> Congress to create DOT and give it authority over these laws.

(Pet. App. 22.)

The Fifth Circuit recognized that the state court decision would permit local parties to usurp federal authority and would have the disastrous effect of fragmenting the federal aviation regulatory scheme.

## CONCLUSION

For the reasons given above, this Court should deny Fort Worth's Petition for a Writ of Certiorari.

Respectfully submitted,

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Nos. 99-1462, 99-1739 and 99-1745

# In the Supreme Court of the United States

CITY OF FORT WORTH, PETITIONER

*v.*

DEPARTMENT OF TRANSPORTATION

DALLAS-FORT WORTH INTERNATIONAL AIRPORT BOARD, PETITIONER

*v.*

DEPARTMENT OF TRANSPORTATION

AMERICAN AIRLINES, INC., PETITIONER

*v.*

DEPARTMENT OF TRANSPORTATION

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the City of Dallas is precluded by the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), or by two subsequent Acts of Congress, the Wright and Shelby Amendments, from restricting routes and services operated by airlines from its Love Field airport.

2. Whether agreements between the Dallas-Fort Worth International Airport Board and various airlines, which provide that the airlines will not use competing airports such as Love Field without the Board's permission, are preempted by federal law.

3. Whether the Department of Transportation was bound by a state court judgment, recently reversed on appeal, in a suit brought by the City of Fort Worth against the City of Dallas, to which the United States was not a party and in which the state court interpreted federal statutes governing Love Field service.

4. Whether the Department of Transportation correctly construed the Wright and Shelby Amendments as permitting "through service" from Love Field when the initial portion of the trip is to another location within Texas and is made on an aircraft with a capacity of no more than 56 passengers.

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# In the Supreme Court of the United States

No. 99-1462

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*v.*

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DEPARTMENT OF TRANSPORTATION

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-52) is reported at 202 F.3d 788. The orders of the Department of Transportation (Pet. App. 53-177) are unreported.[1]

[1] "Pet. App." refers to the appendix to Fort Worth's petition for a writ of certiorari (No. 99-1462). "FW Pet.," "AA Pet.," and "DFW Pet."

## JURISDICTION

The judgment of the court of appeals (Pet. App. 1-52) was entered on February 1, 2000. The petition for a writ of certiorari in No. 99-1462 was filed on March 3, 2000. The petitions for a writ of certiorari in No. 99-1739 and No. 99-1745 were filed on May 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

In the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, Congress deregulated the domestic airline industry. The Act, after a phase-in period, allowed each airline to operate from any commercial airport and to serve any domestic route without prior regulatory approval. To ensure that state and local governments would not replace federal regulation with regulation of their own, Congress included a preemption provision, which barred state and local governments from enforcing any law "related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b); see *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378-379 (1992). That provision, however, "does not limit" a state or local government that "owns or operates an airport" from "carrying out its proprietary powers and rights." 49 U.S.C. 41713(b)(3).[2]

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refer to the petitions for a writ of certiorari filed by Fort Worth, American Airlines, and the Dallas-Fort Worth International Airport Board, respectively.

[2] Section 41713(b) provides, in pertinent part:

> Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

Two subsequent Acts of Congress specifically govern airline service at Love Field airport in Dallas. The Wright Amendment, enacted in 1980, restricts interstate service at Love Field, but expressly authorizes certain service. International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 48-49.[3] The Shelby Amendment,

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* * * * *

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

[3] The Wright Amendment (§ 29, 94 Stat. 48) provides, in pertinent part:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.

* * * * *

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from,

enacted in 1997, expanded the scope of interstate service authorized at Love Field. Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-66, § 337, 111 Stat. 1447.[4]

The Department of Transportation is responsible for administering the preemption provisions of 49 U.S.C. 41713. See 49 U.S.C. 40113(a) (Secretary of Transportation may take whatever action he "considers necessary to carry out this part, including conducting investigations, prescribing regulations, standards, and procedures, and issuing orders"); 49 U.S.C. 46101(a)(2); see also *American Airlines* v. *Wolens*, 513 U.S. 219, 229 n.6, 234 (1995) (Department of Transportation is the "superintending agency" and "experienced administrator" of the preemption provision). The Depart-

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and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

[4] The Shelby Amendment (§ 337, 111 Stat. 1447) provides, in pertinent part:

(a) IN GENERAL.—For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXEMPTION.—The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 *et seq.*) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

* * * * *

ment is also responsible for administering and enforcing the Wright and Shelby Amendments. *Kansas* v. *United States*, 16 F.3d 436, 438 (D.C. Cir.), cert. denied, 513 U.S. 945 (1994); *Cramer* v. *Skinner*, 931 F.2d 1020, 1024 (5th Cir.), cert. denied, 502 U.S. 907 (1991); *Continental Air Lines* v. *Department of Transp.*, 843 F.2d 1444, 1448 (D.C. Cir. 1988).

In this case, the Department of Transportation, after soliciting and reviewing comments, issued a ruling interpreting those statutes. The Department concluded that Dallas may not restrict the routes and services that airlines provide from Love Field, either directly or by contract between the Dallas-Fort Worth International Airport Board (the DFW Airport Board) and an individual airline. Pet. App. 93-127, 133-141.[5]

1. For many years, the twin cities of Dallas and Fort Worth each operated their own airports, which competed to be the area's principal airport. Love Field was the local airport for Dallas. The cities resolved the dispute by agreeing to build Dallas-Fort Worth International Airport (DFW Airport). See *Cramer*, 931 F.2d at 1023. The cities' agreement, set forth in their 1968 Regional Airport Concurrent Bond Ordinance (1968 Bond Ordinance), required the cities to phase out virtually all interstate scheduled service at their local airports to the extent "legally permissible." Pet. App. 2-3, 58-61.

After DFW Airport opened, Dallas continued to operate Love Field. The interstate airlines moved to DFW Airport, but Southwest Airlines, then a new airline that provided service only within Texas, refused to move. After extensive litigation, Southwest Airlines won a judgment entitling it to

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[5] The DFW Airport Board is a local governmental body created and authorized under state law to be the owner and operator of Dallas-Fort Worth International Airport. Dallas appoints seven of the members of the 11-member Board. Pet. App. 58.

continue using Love Field for flights within Texas. See *Cramer*, 731 F.2d at 1023; Pet. App. 3.

Although Southwest Airlines initially operated only intrastate routes, after the enactment of the Airline Deregulation Act, the Civil Aeronautics Board ruled, over the objection of Dallas and Fort Worth, that Southwest Airlines could operate a Love Field-New Orleans route. *Cramer*, 731 F.2d at 1023. In response to that decision, Congress enacted the Wright Amendment, which was designed as a compromise between the two cities and Southwest Airlines. See H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979); Pet. App. 3-4, 64, 123.

The Wright Amendment restricts interstate scheduled passenger service from Love Field. Subsection (a) permits interstate flights from Love Field by aircraft having a capacity of no more than 56 passengers. Subsection (c) permits flights from Love Field to the four States bordering Texas—Louisiana, Arkansas, Oklahoma, and New Mexico—on aircraft of any size, but prohibits interline or through service. Pet. App. 3-5 n.1.[6] Dallas and Fort Worth did not attempt to block Southwest Airlines from adding interstate routes in accordance with the Wright Amendment. Nor did the cities amend the 1968 Bond Ordinance to reflect the Wright Amendment. *Id.* at 64-67.

In 1997, Congress enacted the Shelby Amendment, which expands the interstate service authorized at Love Field. The Shelby Amendment clarifies subsection (a) of the Wright Amendment as including large aircraft of up to 300,000 pounds gross aircraft weight if they are configured

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[6] Interline service is connecting service involving a change from one airline to another that is provided under agreements whereby each carrier agrees to accept tickets written for travel on it by the other carrier; the carriers provide for transfer of baggage between the flights. Through service is service provided between the origin and destination on a single ticket.

or reconfigured to have no more than 56 seats. The Shelby Amendment expands subsection (c) to add three more States —Mississippi, Alabama, and Kansas—to those to which service from Love Field is permissible on an aircraft of any size. Pet. App. 5-7 & n.2, 71-72.

2. After the enactment of the Shelby Amendment, Fort Worth sued Dallas in Texas state court, contending that Dallas was constrained by the 1968 Bond Ordinance from allowing the expanded service at Love Field authorized by the Shelby Amendment. *City of Fort Worth* v. *City of Dallas*, No. 48-171109-97 (Tarrant County Tex. Dist. Ct., filed Oct. 10, 1997). Fort Worth was supported by the DFW Airport Board and American Airlines, which has a major hub at DFW Airport. The Department of Transportation was not a party to that action. Pet. App. 148-149, 158-159.

In December 1998, the state court issued a judgment holding that Dallas was obligated by the 1968 Bond Ordinance to prohibit airlines from using Love Field to serve points outside Texas and the four States identified in the Wright Amendment. The court further held that federal law did not bar Dallas from regulating flights in that manner. Pet. App. 178-181.

Dallas, together with various airlines that planned to use Love Field, appealed. The state court of appeals stayed proceedings pending the Fifth Circuit's decision in this case. Pet. App. 7. After the Fifth Circuit issued its decision, the state court of appeals issued its own decision, which reversed the state trial court. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).

Meanwhile, Dallas sued Forth Worth and the Department of Transportation in federal court, seeking a declaratory judgment that Dallas may not bar airlines from operating interstate service at Love Field. *City of Dallas* v. *Department of Transp.*, No. 3-97CV-2734-T (N.D. Tex., filed Nov. 6,

1997). That action was stayed pending the resolution of this case. Pet. App. 7, 75-76.

3. While the state and federal court actions were pending, the Department of Transportation commenced a proceeding to interpret the federal statutes governing Love Field. Order No. 98-8-29 (Aug. 25, 1998). One week after the state trial court issued its judgment in *City of Fort Worth*, the Department issued its final orders on the statutory interpretation issues and various jurisdictional and procedural issues. Order Nos. 98-12-27 and 98-12-28 (Dec. 22, 1998) (Pet. App. 53-177).[7]

a. As a threshold matter, the Department determined that it has the authority to issue an order interpreting the relevant federal statutes, which it is responsible for administering and enforcing. Pet. App. 154-158 (citing, *inter alia*, *Northwest Airlines* v. *County of Kent*, 510 U.S. 355, 366-367 (1994), and *Wolens*, 513 U.S. at 229 n.6, 234). The Department further noted that the dispute in this case "raises substantial federal issues that this Department should address." *Id.* at 155.

The Department of Transportation concluded that the pending state and federal court proceedings did not preclude it from issuing its interpretation of the federal statutes. The Department explained that, "[g]iven its responsibilities for administering those statutes, the Department should assist the parties by issuing its interpretation." The Department also observed that it was not a party to the state court action, and thus would not be bound by the ensuing state court judgment. Pet. App. 158-159.

b. On the merits, the Department of Transportation concluded that Dallas cannot impose the restrictions on interstate service from Love Field sought by Fort Worth (*e.g.*, a

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[7] The Department of Transportation subsequently reaffirmed the orders on reconsideration. Order Nos. 99-4-13 and 99-4-14 (Apr. 13, 1999).

prohibition on flights from Love Field to States other than the four identified in the Wright Amendment). The Department explained that those restrictions "are equivalent to route regulation." Pet. App. 103. As such, the restrictions are preempted by 49 U.S.C. 41713(b), which prevents state and local governments from enforcing laws "related to a price, route, or service of an air carrier," unless saved by its exception for actions of an owner or operator of an airport to "carry[] out its proprietary powers and rights."

The Department of Transportation noted that the courts have held that States and cities, as airport proprietors, may restrict airline service when "necessary to carry out a legitimate airport goal," such as to alleviate ground congestion, noise, or other environmental problems. Pet. App. 100. But the Department added that "[n]o court has held or suggested that one airport may adopt a perimeter rule [*i.e.*, a rule restricting the distance of flights to and from that airport] to protect a different airport from competition." *Ibid.*

Here, the Department of Transportation determined that the record did not establish that any "legitimate airport goal" would be advanced by the service restrictions sought by Fort Worth. The Department observed that the parties had not presented any evidence showing, for example, that the additional Love Field service authorized by the Shelby Amendment "would in any way threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport." Pet. App. 111. Indeed, the Department observed, the Wright and Shelby Amendments continue to impose substantial restrictions on long-haul Love Field services by barring the use of aircraft with more than 56 seats on flights outside Texas and a seven-state area. *Id.* at 112. The Department noted that the flights operated from Love Field, even after the Shelby Amendment, "will be a

small fraction" of the flights operated from DFW Airport. *Ibid.*[8]

In addition, the Department of Transportation concluded that, even aside from the express preemption provision of 49 U.S.C. 41713(b), the Wright and Shelby Amendments impliedly preempt the cities' regulation of service at Love Field. Pet. App. 120-127. The Department reasoned that "Congress has occupied the field" with respect to interstate service at Love Field and that "allowing the cities to restrict service would frustrate Congress' policies." *Id.* at 121.

c. The Department of Transportation concluded that the "use agreements" that the DFW Airport Board entered into with individual airlines are preempted by 49 U.S.C. 41713(b), to the extent that the agreements prevent the airlines from operating interstate flights at Love Field (or other airports in the Dallas-Fort Worth area) without the DFW Airport Board's consent. Pet. App. 133-141.[9] The Department explained that the DFW Airport Board cannot regulate airline routes by contract any more than Dallas and Fort Worth can regulate routes by ordinance. *Id.* at 135. The Department observed that the consent provisions in the use agreements "frustrate Congress' policies of free entry and exit in airline markets and deny the public the benefit of

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[8] The Department of Transportation also found that Dallas was not a "proprietor" of DFW Airport, and therefore could not justify route restrictions at Love Field on the basis of its needs as the owner or operator of DFW Airport. The Department explained that, although Dallas chooses seven of the 11 members of the DFW Airport Board, Dallas does not control that Board, as reflected in the conflicting positions of Dallas and the Board in this proceeding and in the state court proceeding. The Department also noted that eight members of the DFW Airport Board must approve any decision granting an airline a waiver to use an airport other than DFW Airport for interstate service. Pet. App. 118-120.

[9] Although airlines may use DFW Airport without signing a use agreement, airlines signing a use agreement pay lower fees for the use of that facility. Pet. App. 139.

additional competition and additional service options." *Id.* at 139.

d. The Department of Transportation concluded that airlines may offer through service and ticketing from Love Field to points outside the seven-state service area established by the Wright and Shelby Amendments, if the through service involves (i) an initial flight on an aircraft with a capacity of 56 passengers or fewer from Love Field to another airport in Texas followed by (ii) a flight from that Texas airport to an ultimate destination outside the seven-state service area. Pet. App. 141-145. The Department explained that subsection (a) of the Wright Amendment contains no restriction on through service by aircraft with 56 seats or fewer; only larger aircraft are prevented, by operation of subsection (c), from offering through service and ticketing. The Department also noted that the Wright Amendment imposes no restrictions on intrastate service (*e.g.*, the initial leg of the contemplated travel). *Id.* at 142-143.

The Department of Transportation reasoned that a contrary approach would create a distinction that could not have been intended by Congress. The Department noted that the Wright and Shelby Amendments do not prohibit through service, the initial leg of which is a flight, on an aircraft with a capacity of 56 passengers or fewer, that begins at Love Field and ends in another State. The Department concluded that Congress did not intend a different result where the first leg of the through service was a flight that ended in Texas rather than another State. Pet. App. 145.

4. The court of appeals affirmed the Department of Transportation's orders. Pet. App. 1-52.

a. The court of appeals held that 28 U.S.C. 1738, the "full faith and credit" statute,[10] did not require the Department of Transportation to give preclusive effect to the judgment of the state trial court in *City of Fort Worth*. The court reasoned that Section 1738, by its terms, applies only to "court[s]," not to federal agencies. Pet. App. 17-19.

The court of appeals also held that the Department of Transportation was not required to give preclusive effect to the state trial court judgment as a matter of federal common law. Pet. App. 19-23. In resolving that question, the court weighed "the policies favoring full faith and credit, including repose and federalism concerns," against "the federal interests present here." *Id.* at 19-20. First, the court reasoned that the interests in repose were not strongly implicated, because the Department's proceedings were already well underway when the state court issued its judgment. *Id.* at 21. Second, the court reasoned that the national interests in this case are particularly strong, both because the case involves airline operations, a subject principally regulated by the federal government, and because Congress has twice specifically addressed aviation regulation with respect to Love Field. *Ibid.* Third, the court reasoned that requiring the Department to give preclusive effect to the state court judgment would produce "inconsistent results," because some of the parties before the Department were not parties to the state court proceedings. *Id.* at 22.

b. The court of appeals held that the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. 41713(b), bars Dallas from restricting interstate service at

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[10] Section 1738 provides, in relevant part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken."

Love Field, as Fort Worth contended was required under the 1968 Bond Ordinance. Pet. App. 32-39.[11] The court noted that the parties did not seriously dispute that the restrictions "relat[e] to * * * routes" within the scope of Section 41713(b). *Id.* at 33. The parties disputed only whether the restrictions are within the "proprietary powers" exception to Section 41713(b) for actions of an airport owner carrying out its "proprietary powers and rights." *Ibid.* The court agreed with the Department of Transportation that the exception is inapplicable here. *Id.* at 37-39.

The court of appeals, consistent with other courts that have addressed similar issues, recognized that airport proprietors play an "extremely limited role in the regulation of aviation." Pet. App. 33-34 (internal quotation marks omitted) The court noted that airport proprietors have thus been permitted to adopt perimeter rules and similar route restrictions only to "alleviate an existing problem at the airport or in the surrounding neighborhood," such as airport congestion, noise, or other environmental concerns. *Id.* at 35. The court found that petitioners had failed to justify the restrictions on Love Field service as serving any comparable local objective. *Id.* at 37-38. The court concluded that the reallocation of flights between airports, "in and of itself," is not a sufficient objective to satisfy the proprietary powers exception. *Id.* at 38.[12]

c. The court of appeals also held that the use agreements between the DFW Airport Board and individual airlines are

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[11] The court of appeals found it unnecessary to decide whether the Department's preemption ruling is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court determined that the Department's ruling is correct even under a de novo standard of review. Pet. App. 31-32.

[12] The court of appeals declined to address the alternative grounds for preemption found by the Department of Transportation. Pet. App. 38-39 nn.16, 17.

preempted, to the extent that those agreements prevent an airline from providing interstate service at airports such as Love Field without the Board's consent. Pet. App. 43-47.[13] The court noted that government contracts are subject to preemption if they are an attempt by a state or local government to regulate. *Id.* at 44 (citing, *inter alia*, *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 226 (1993)). The count found that the use agreements, which were designed to implement the 1968 Bond Ordinance and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance," are an attempt to regulate airline service. *Id.* at 45. In view of the "overlap" between the use agreements and the 1968 Bond Ordinance, which the court had already held to be preempted, the court concluded that the use agreements are likewise "an impermissible attempt to regulate in an area where the federal government has preempted state regulation." *Ibid.*

d. Finally, the court of appeals affirmed the Department of Transportation's determination that an airline may, consistent with the Wright and Shelby Amendments, offer through service from Love Field to points outside the seven-state service area if the airline uses a Texas city as a connecting point and an aircraft with 56 seats or fewer to fly to the Texas connecting point. Pet. App. 47-52. The court held that the language of the Wright and Shelby Amendments is not dispositive, but that the Department's construction is permissible under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 50. The court explained that the Department could reasonably

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[13] Again, the court of appeals did not decide whether the Department of Transportation's ruling on this issue is entitled to deference under *Chevron*, because the court concluded that the ruling is correct under a de novo standard of review.

conclude that, because the Wright Amendment imposed an express prohibition on through service on large aircraft operating under subsection (c) but not on small aircraft (*i.e.*, those with a capacity of no more than 56 passengers) operating under subsection (a), Congress intended to permit small aircraft to operate free of such a prohibition. *Ibid.* The court also observed that the Department's construction of the Wright and Shelby Amendments as permitting through service where the initial flight is on an aircraft with no more than 56 seats is "not inconsistent with a statutory scheme aimed at preserving Love Field as a primarily shorthaul facility while still allowing some long haul service." *Id.* at 51.

## ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court, any other court of appeals, or any state supreme court. This Court's review is therefore not warranted.

1. Petitioners Fort Worth (Pet. 13-19) and American Airlines (Pet. 11-27) challenge the court of appeals' ruling that 49 U.S.C. 41713(b), the express preemption provision of the Airline Deregulation Act, prevents the enforcement of the 1968 Bond Ordinance whereby Fort Worth and Dallas undertook to phase out interstate flights at their municipal airports. Section 41713(b) bars a city from enacting or enforcing any law "related to a price, route, or service of an air carrier," unless the city is acting, in its capacity as the owner or operator of an airport, to "carry[] out its proprietary powers and rights." 49 U.S.C. 41713(b)(1) and (3). Petitioners do not dispute that the 1968 Bond Ordinance is "a law related to a price, route, or service of an air carrier." 49 U.S.C. 41713(b)(1). But petitioners contend that the 1968 Bond Ordinance comes within the statutory exception as an exercise of the cities' "proprietary powers and rights."

a. The court of appeals and the Department of Transportation correctly concluded that Dallas would not be exercising "proprietary powers and rights," 49 U.S.C. 417123(b)(3), in restricting service at Love Field, at least absent a stronger justification for doing so than was offered by petitioners here.[14]

As the court of appeals recognized (Pet. App. 33-34), Congress has reserved an "extremely limited role * * * for airport proprietors in our system of aviation management." *British Airways Bd.* v. *Port Auth.*, 564 F.2d 1002, 1010 (2d Cir. 1977); see *City & County of San Francisco* v. *FAA*, 942 F.2d 1391, 1394 (9th Cir. 1991) (observing that "[t]he federal government regulates aircraft and airspace pervasively," although reserving "a limited role for local airport proprietors" in certain areas), cert. denied, 503 U.S. 983 (1992). Any restriction on airline service that a state or local government, in its capacity as airport proprietor, imposes under Section 41713(b)(3) must be reasonable, non-arbitrary, and non-discriminatory. *National Helicopter Corp.* v. *City of N.Y.*, 137 F.3d 81, 89 (2d Cir. 1998) (citing *British Airways*, 564 F.2d at 1005). The few federal cases that have allowed an airport proprietor to allocate service between two airports primarily relied on the proprietor's need to relieve ground congestion, noise, or other environmental concerns. *Id.* at 88-89.[15]

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[14] The Department of Transportation also concluded that the proprietary powers exception of Section 41713(b)(3) is inapplicable, in any event, because Dallas is not the proprietor of DFW Airport, and thus cannot limit service at Love Field in aid of a propriety interest in DFW Airport. See Pet. App. 118-120; see p. 10 note 8, *supra*. The court of appeals found it unnecessary to reach that alternative ground for decision. Pet. App. 38-39 n.16.

[15] American Airlines cites statements made during the congressional debate on the Airline Deregulation Act that an airport proprietor could determine the "level and nature of service to be provided at airports." See

Petitioners did not advance any of those justifications for restricting airline service at Love Field. Nor did petitioners offer any other reasonable justification. Petitioners merely assert (FW Pet. 13) that DFW Airport might suffer some economic harm if additional flights are allowed from Love Field. But the Department of Transportation found that additional Love Field service would not undermine DFW Airport's position as the area's principal airport. See Pet. App. 56 (noting that "[n]o one has tried to show in this proceeding" that additional Love Field service would have such an effect). The Department's finding is clearly reasonable, especially given the Wright and Shelby Amendments, which continue to impose significant restrictions on Love Field service. As the Department noted, even if the currently proposed expansions in service occur, they would amount to a total of 360 daily flights at Love Field, "a small fraction of the 2,800 flights operated each day at DFW." *Id.* at 112-113.[16]

At bottom, petitioners are arguing that Dallas should be permitted to restrict business for Love Field simply to preserve business for DFW Airport—that is, to limit competition between the two airports in order to favor the airport

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124 Cong. Rec. 37,419-37,420, 38,526 (1978). The cited statements were made in response to specific inquiries about whether airports could continue to regulate service in order to deal with noise and other environmental problems. The statements thus do not support petitioners' claim of broad authority to limit routes and services.

[16] American Airlines also suggests (Pet. 20, 25-26) that the perceived need to limit flights from Love Field 30 years ago, when DFW Airport was established, is sufficient to justify protecting a thriving DFW Airport from competition today. But nothing in the text of Section 41713(b) suggests that a regulation, if once justified as a permissible exercise of an airport owner's proprietary rights, remains justified notwithstanding changed conditions. The Department of Transportation reasonably concluded that the relevant inquiry is whether a restriction is currently needed. See, *e.g.*, Pet. App. 111-113.

that petitioners prefer. The Department of Transportation properly concluded that such discriminatory restrictions "would be contrary to the very essence of deregulation, which is intended to promote competition." Pet. App. 106. This Court has observed that States and their political subdivisions may not, in light of the Airline Deregulation Act, impose "their own public policies or theories of competition or regulation on the operations of an air carrier." *American Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 229 n.5 (1995); see *New England Legal Found.* v. *Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989) (in affirming the Department of Transportation's decision invalidating the fee structure imposed by an airport owner to discourage small aircraft from using its primary airport, the court observed that the proprietary rights exception is "not unlimited and is subject to curbing if it transgresses into the general field reserved for federal interest").

Petitioner American Airlines broadly predicts (Pet. 4-5, 11-12, 15, 18-27), without citing any factual or legal support, that the court of appeals' decision will introduce uncertainty into airport management, impede airports' ability to raise revenues in financial markets, and interfere with regional planning. But there is no reason to assume, based on American Airlines' assertions alone, that those predictions will prove accurate. To the contrary, the court of appeals did not purport to announce any new rule of law in this case; instead, the court simply affirmed the well-established rule that airports may not regulate airline routes and services, unless they demonstrate that such regulation is reasonable and necessary to protect their proprietary interests. The court did not suggest that, if a local airport authority could demonstrate that restrictions on service at one of its airports were necessary in order to preserve the economic viability of another of its airports, such restrictions would be impermissible.

b. Petitioners Fort Worth (Pet. 13-16) and American Airlines (Pet. 11-14) contend that the court of appeals' decision on the preemption issue conflicts with *Western Air Lines, Inc.* v. *Port Authority*, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006 (1988), and *Arapahoe County Public Airport Authority* v. *Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998). Petitioners are mistaken with respect to both decisions.

In *Western Air Lines*, the Second Circuit identified a specific problem—airport "congestion"—as a permissible reason for the Port Authority, as the proprietor of the three airports in the New York metropolitan area, to restrict long-haul flights to and from LaGuardia Airport. See 817 F.2d at 223. The Second Circuit thus did not, as petitioners suggest, recognize any general authority of local governments to allocate air traffic among airports that they own. Moreover, in its subsequent *National Helicopter* decision, the Second Circuit stated that the proprietary rights exception allows municipalities to regulate "only a narrowly defined subject matter—aircraft noise and other environmental concerns at the local level." 137 F.3d at 89. Significantly, *National Helicopter*, in disapproving local regulation of flight paths, stated that the proprietary rights exemption gives "no authority to local officials to assign or restrict routes." *Id.* at 92. There is no conflict between the Second Circuit and the Fifth Circuit on any issue presented in this case.[17]

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[17] Fort Worth also relies (Pet. 15-16) on *City of Houston* v. *FAA*, 679 F.2d 1184 (5th Cir. 1982), for the proposition that an airport proprietor may allocate long-haul and short-haul flights among its airports. In *City of Houston*, however, the federal government, not a state or local government, was the owner of the airports, Washington National Airport and Dulles International Airport. See *id.* at 1186. As the Fifth Circuit explained in this case (Pet. App. 35 n.14), the restrictions of Section 41713(b) do not apply to the federal government. Moreover, the court upheld the perimeter rule in *City of Houston* because it was a reasonable

In *Arapahoe*, an airport authority prohibited scheduled airline service at an airport where such service had never been offered. 956 P.2d at 590-591. The Colorado Supreme Court determined that the prohibition did not relate to airline services, fares, or routes, within the meaning of Section 41713(b), and thus was not subject to preemption. *Id.* at 594-595. Although the court went on to conclude that the prohibition came within the proprietary rights exception, *id.* at 595, that conclusion was not essential to the court's holding that the prohibition was not preempted. Here, in contrast, the Fifth Circuit was concerned with a restriction that indisputably *does* relate to services and routes. See Pet. App. 33 (court of appeals notes that there was "no significant argument" in this case that the 1968 Bond Ordinance related to airline services and routes). The Colorado Supreme Court expressly distinguished regulations that prohibit all scheduled passenger service at an airport, as in *Arapahoe*, from regulations that allocate long-haul and short-haul scheduled passenger service between or among multiple airports, as in *Western Air Lines* and this cases. See 956 P.2d at 595; see also *id.* at 596 n.12 (distinguishing the circumstances involv-

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means of reducing congestion at Washington National Airport and dealing with severe under-utilization of Dulles International Airport, which threatened its economic viability. 679 F.2d at 1191-1192. These proprietary objectives, however, have no application to this case. And, even if some tension existed between the decision below and *City of Houston*, this Court does not grant review to resolve intracircuit conflicts.

Fort Worth also identifies (Pet. 16-17) instances in which the Department of Transportation has considered the closing of local airports in favor of new regional airports. But the Department was acting in those instances in furtherance of its own responsibilities to administer federal aviation laws and airport programs. The decisions whether to close the local airports were not to be made by a local government unilaterally. Here, in contrast, the Department has determined that competition between the two airports in the Dallas-Fort Worth area serves the public interest and does not significantly harm DFW Airport.

ing the Centennial Airport in *Arapahoe*, "where scheduled passenger service has never been permitted," from those involving Love Field, where the proprietor sought to cut back on scheduled passenger service that had previously been offered). Accordingly, because the present case and *Arapahoe* differ so significantly in their facts and circumstances, they do not present any square conflict.[18]

c. In any event, even if petitioners' efforts to enforce restrictions on service at Love Field were not expressly preempted by Section 41713(b), they are impliedly preempted by the Wright and Shelby Amendments. The court of appeals found it unnecessary to reach that independent ground for preemption. Pet. App. 39 n.17. The Department of Transportation, however, concluded that the restrictions on Love Field service are preempted both expressly and impliedly. *Id.* at 120-127.

This Court has found implied conflict preemption "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); accord *Geier* v. *American Honda Motor Co.*, No. 98-1811, slip op. 10 (May 22, 2000). That standard is satisfied here.

The Wright and Shelby Amendments prescribe, with specificity, the interstate service that airlines may provide at Love Field. Congress obviously did not intend in those amendments simply to give Dallas, as the proprietor of Love Field, the option to permit such service, if the city chose to

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[18] The dispute in *Arapahoe* is far from resolved. The Federal Aviation Administration recently determined that the airport owner could not ban scheduled service at the airport where the owner allowed comparable non-scheduled service. *Centennial Express Airlines* v. *Arapahoe County Pub. Airport Auth.*, FAA Order No. 1999-1 (Feb. 28, 1999). That decision is now on appeal to the Tenth Circuit. *Arapahoe County Pub. Airport Auth.* v. *FAA*, No. 99-9508.

do so. Rather, Congress sought to resolve the matter definitively. The Wright Amendment was thus described in the Conference Report as "provid[ing] a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years"—a "settlement" that "ha[d] been agreed to by the representatives of Southwest Airlines, the City of Dallas, the City of Forth Worth, DFW airport authority, and related constituent groups." H.R. Rep. No. 716, 96th Cong., 1st Sess. 24 (1979). The Shelby Amendment authorized additional service at Love Field. Congress ultimately excluded from the Shelby Amendment a proposed provision that would have given Dallas a veto over some aspects of that expanded service. See Pet. App. 126-127 (discussing provision). Congress's objective in the Wright and Shelby Amendments to allow specified interstate service from Love Field, if airlines choose to offer it, would be frustrated by local laws, such as the 1968 Bond Ordinance, that purport to disallow such service. Accordingly, as the Department of Transportation concluded, the Wright and Shelby Amendments impliedly preempt local laws restricting service at Love Field.[19]

2. Petitioners Forth Worth (Pet. 19-21) and DFW Airport Board (Pet. 12-20) challenge the court of appeals' holding that Section 41713(b) preempts the enforcement of the provisions of the Board's use agreements with individual airlines that prevent the airlines from using Love Field without the Board's consent.

As the court of appeals recognized (Pet. App. 43-47), the use agreements constitute regulation, by a local government

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[19] The Department of Transportation also concluded that local laws restricting service at Love Field are impliedly preempted because Congress sought to "occup[y] the field" of regulation of interstate service at Love Field. Pet. App. 121-122. See *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633-634 (1973).

entity, of air carriers' routes and services. The relevant provisions of the use agreements "are essentially coextensive with the [1968 Bond] Ordinance," were designed to implement the service restrictions contained in the Ordinance, and, in their most recent version, "directly link[] the airlines' obligations to the terms of the Ordinance." *Id.* at 45. Consequently, the court of appeals correctly held that the use agreements are preempted for the same reasons, and to the same extent, that the 1968 Bond Ordinance is preempted.[20]

Contrary to petitioners' assertions (FW Pet. 19-21; DFW Pet. 12-14), the court of appeals' decision does not conflict with this Court's decision in *Wolens* with respect to the reach of Section 41713(b). In *Wolens*, the Court held that Section 41713(b) "allows room for court enforcement of contract terms set by the parties themselves" in "suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." 513 U.S. at 222, 228. There, the airlines themselves had imposed the contract obligations, which related to frequent-flyer programs for airline passengers. The Court concluded that Section 41713(b) did not preclude enforcement of those "privately ordered obligations." *Id.* at 228.

This case, in contrast to *Wolens*, concerns contract obligations that were imposed by a local government entity, not a private party, and that were designed to effectuate a local law, not private "business judgments." 513 U.S. at 229. The

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[20] Petitioner DFW Airport Board argues (Pet. 17-20) that, even if the 1968 Bond Ordinance is preempted, it does not follow that the use agreements are preempted, simply because those agreements refer to the Ordinance. But the use agreements do more than refer to the Ordinance. The purpose of the consent provision of the use agreements is to enforce a government policy by restricting airlines to the routes favored by the cities and the Board.

*Wolens* Court expressly distinguished such "state-imposed obligations" from the private obligations at issue in that case. *Id.* at 222, 228. Otherwise, a state or local government entity, such as the DFW Airport Board here, could readily circumvent Section 41713(b) by enforcing "price, route, or service" restrictions though contract, rather than through statute.[21]

Finally, although petitioner DFW Airport Board claims (Pet. 19) that the applicability of Section 41713(b) to use agreements between airport operators and individual airlines is "a far-reaching issue of nationwide importance," petitioners do not cite *any* decision of *any* court that addresses that issue.[22] The dearth of such decisions confirms that the issue is not, at least at this time, of sufficiently recurring significance to warrant this Court's review.

3. Petitioner Fort Worth contends (Pet. 22-26) that the Department of Transportation was required to give pre-

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[21] Petitioners note (FW Pet. 21; DFW Pet. 16) that this Court in *Building & Construction Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218 (1993), drew a distinction, for purposes of implied preemption analysis under the National Labor Relations Act, between a State's acts in a regulatory capacity and a State's acts in a proprietary capacity. See also *Associated Gen. Contractors* v. *Metropolitan Water Dist.*, 159 F.3d 1178 (9th Cir. 1998) (case cited by petitioner DFW Airport Board drawing such a distinction with respect to express preemption analysis under ERISA). But such cases do not resolve the question whether the DFW Airport Board was engaging in regulation, as opposed to appropriate proprietary activity, in imposing a contract requirement that prevents signatory airlines from using Love Field without the Board's consent. Moreover, to the extent that the analysis of whether a state government's action is proprietary or regulatory is informed by whether private parties engage in such action, see *Building & Constr. Trades Council*, 507 U.S. at 228-229, private parties do not ordinarily dictate which airports an airline may use.

[22] We are informed by the Department of Transportation that very few other airports attempt to enter into use agreements that require an airline to obtain the airport's consent to use another airport in the area.

clusive effect to the state trial court's December 1998 judgment in *City of Fort Worth*, which held that the restrictions on Love Field service contained in the 1968 Bond Ordinance "are not preempted by federal law, and are valid and enforceable." Pet. App. 179. This issue may well be of no continuing significance. On May 25, 2000, the state court of appeals, which had stayed the appeal in *City of Fort Worth* pending the Fifth Circuit's decision in this case, reversed the trial court's judgment. *Legend Airlines, Inc.* v. *City of Fort Worth*, No. 2-99-088-CV, slip op. at 1-2, 30-31 (Tex. Ct. App.—Fort Worth May 25, 2000) (2000 WL 679286).[23] In any event, contrary to petitioner Fort Worth's assertions, neither 28 U.S.C. 1738 nor federal common-law rules of preclusion required the Department of Transportation to defer to the state trial court's judgment.

Section 1738 provides, in pertinent part, that "[t]he records and judicial proceedings of any court of any * * * State * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken." Section 1738, by its terms, thus requires only that "court[s] within the United States," but not federal agencies, accord "full faith and credit" to the judgments of state courts. Consequently, the statute had no application to the Department of Transportation's administrative proceedings in this case. As the court of appeals noted (Pet. App. 17-18), the only other circuit that has fully considered the question reached the same conclusion. See *NLRB* v. *Yellow Freight Sys., Inc.*, 930 F.2d 316, 320 (3d Cir.) (Section 1738 did not require the NLRB to give preclusive effect to a state

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[23] The court of appeals concluded, *inter alia*, that "the restrictions on Love Field air passenger service contained in the [1968] Bond Ordinance are preempted by the [Airline Deregulation Act]." *Legend Airlines*, slip op. 30.

arbitrator's decision because the NLRB is an agency, not a court), cert. denied, 502 U.S. 820 (1991); cf. *University of Tennessee* v. *Elliott*, 478 U.S. 788, 794-796 (1986) (Section 1738 governs only the preclusive effect to be given to judgments of state "courts," and thus does not apply to unreviewed state administrative decisions). The decision on which petitioner Fort Worth principally relies, *Bath Iron Works Corp.* v. *Director, Office of Workers' Compensation Programs*, 125 F.3d 18 (1st Cir. 1997), is not to the contrary. In that case, the First Circuit recognized, in accordance with *Elliott*, that Section 1738 had no application to that case, which concerned the preclusive effect to be given to a state administrative decision. The court instead relied on non-statutory preclusion doctrines in determining the effect to be accorded that decision. See *id.* at 21.[24]

As for common-law preclusion, this Court has declined to hold that the federal government is precluded by a prior adjudication in circumstances where doing so could undermine important national interests. See *Heck* v. *Humphrey*, 512 U.S. 477, 488-489 n.9 (1994) (citing *United States* v. *Mendoza*, 464 U.S. 154 (1984)). Such interests are implicated where, as here, preclusion would constrain a federal agency

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[24] Petitioner Fort Worth's other claims of a circuit conflict are equally without merit. In *Town of Deerfield* v. *FCC*, 992 F.2d 420 (2d Cir. 1993), the court of appeals did not hold that the FCC was required, by Section 1738 or otherwise, to defer to a state court judgment; rather, the court held that the FCC was required to accord preclusive effect to an earlier federal court judgment. In *Midgett* v. *United States*, 603 F.2d 835, 845 (Ct. Cl. 1979), the Court of Claims did not hold that the agency was required to give preclusive effect to a state court's decree of death; rather, the court stated that the agency should have considered the decree as prima facie evidence of death, suggesting that the decree was entitled to such treatment only because it was issued in a proceeding in rem. *Id.* at 846. The court ultimately held that the agency's decision was arbitrary and capricious, whether or not the state court decree was given full faith and credit. *Id.* at 846-849.

in interpreting statutes that Congress has charged the agency to administer. As the court of appeals observed (Pet. App. 21), this case "involves aviation regulation, an area where federal concerns are preeminent and where [the Department of Transportation] is charged with representing those concerns." More specifically, the case "involves the operation of flights from Love Field, a matter on which Congress has twice specifically legislated." *Ibid.* And the Department was not a party to the state court proceedings. In such circumstances, the Department was not required to defer to the determinations of a state trial court, with no expertise in, or responsibility for, aviation regulation, simply because the state court issued its (now reversed) decision one week before the Department issued its own decision.

4. Petitioner DFW Airport Board challenges (Pet. 20-29) the Department of Transportation's decision, affirmed by the court of appeals, that airlines may offer through service from Love Field to ultimate destinations outside the seven-state area, if the travel begins with a flight from Love Field to an intermediate Texas destination on a "commuter aircraft" (*i.e.*, one with a capacity of no more than 56 passengers). The court of appeals, after determining that Congress did not speak directly to this question, held that the Department reasonably interpreted the Wright and Shelby Amendments as allowing such service. Pet. App. 50. The court of appeals' application of the mode of analysis articulated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the particular facts and circumstances of this case does not warrant this Court's review.

Here, the Department of Transportation assumed, and no party disputed, that the Wright Amendment does not bar through service that commences with a flight on a commuter

aircraft between Love Field and a point outside Texas.[25] The only difference here is that the initial leg of the flight would be between Love Field and a point inside Texas. The Department concluded that Congress did not intend to treat Love Field flights on commuter aircraft differently, with respect to the availability of through service, depending on whether the flight ended inside or outside Texas. As the court of appeals held (Pet. App. 50-52), the Department's conclusion was reasonable and consistent with the Wright and Shelby Amendments.

The court of appeals' decision does not, as petitioner DFW Airport Board asserts (Pet. 24, 28), conflict with *Continental Air Lines* v. *Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1986). The two cases address different questions. In *Continental Air Lines*, the court of appeals affirmed the Department of Transportation's determination that the "through service" restriction in subsection (c) of the Wright Amendment did not prevent an airline from operating between Love Field and Houston, simply because the airline provided through service or ticketing with another carrier on its other flights. *Id.* at 1445-1154. The court also affirmed the Department's conclusion that subsection (a) of the Wright Amendment allows all airlines, not merely commuter airlines, to operate interstate flights from Love Field in aircraft with a capacity of no more than 56 passengers. *Id.* at 1454-1455. Neither issue is raised in this case.[26]

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[25] As the court of appeals explained (Pet. App. 50-52), subsection (a) of the Wright Amendment, which allows interstate service from Love Field on commuter aircraft, contains no restriction on through service; subsection (c), which does contain a prohibition on through service, does not apply to commuter aircraft, but only to "large jets" (*i.e.*, aircraft with a capacity of more than 56 passengers).

[26] Petitioner DFW Airport Board also notes (Pet. 21-22) that another portion of the Department of Transportation's order that was reviewed in *Continental Air Lines* concluded that an airline could not provide flights

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2000

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from Love Field, with an intermediate stop in Houston, to points outside the four contiguous States identified in the Wright Amendment. See Order No. 85-12-81, 1985 WL 57886, at *10-11 (Dec. 31, 1985). The Department's earlier ruling, which was concerned only with whether such service could be provided on large jets (*i.e.*, aircraft with a capacity of more than 56 passengers), construed subsection (c) of the Wright Amendment. The ruling in this case, which was concerned with whether such service could be provided on commuter aircraft, construed subsection (a) of the Wright Amendment. There is no inconsistency between the two agency rulings.

Supreme Court, U.S.
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No. 99-1462

In The

# Supreme Court of the United States

THE CITY OF FORT WORTH, TEXAS,

*Petitioner,*

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY BRIEF OF PETITIONER CITY OF FORT WORTH

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## I. RESPONDENTS HAVE FAILED TO RECONCILE THE CONFLICTS BETWEEN THE FIFTH CIRCUIT'S DECISION AND OTHER OPINIONS CONSTRUING PROPRIETARY RIGHTS

In 1968, at the behest of the Civil Aeronautics Board ("CAB"), Fort Worth and Dallas contracted to sell billions of dollars in bonds to finance and construct DFW Airport, and to consolidate all scheduled passenger service at the new airport. Because the revenue derived from DFW Airport is the only source of funds to repay the bonds, Fort Worth based its economic future on contractual assurances that Love Field would not compete for scheduled passenger service. Fort Worth fulfilled its obligation by destroying its airport, Greater Southwest, to make way for DFW Airport.

Now, thirty years later, and with a billion dollars in bonds still outstanding, DOT has changed the rules, abrogated contracts, and cast aside CAB's determination that Dallas and Fort Worth should be served by a single airport. DOT justifies all this by presuming Congress intended to preempt all existing restrictions when it enacted the ADA in 1978 – ten years **after** Dallas and Fort Worth instituted the regional airport plan in the Concurrent Bond Ordinance.

To the contrary, Congress manifested its intent that the ADA not interfere with the longstanding rights of local airport proprietors – like Dallas and Fort Worth – to regulate the level of service at their airports. Congress carefully prefaced the preemption provision with the qualifying phrase "[e]xcept as provided in this subsection," 49 U.S.C. § 41713(b)(1). In the same subsection, Congress again emphasized that the preemption provision "does not limit" local governments from "carrying out" their proprietary powers and rights. 49 U.S.C. § 41713(b)(3). Congress expressed its desire to encourage "air transportation at major urban areas through secondary or satellite airports *if* consistent with regional airport

plans of regional and local authorities. . . . " 49 U.S.C. § 40101(a)(8) (emphasis added).

This deference for local airport authority is also reflected in the ADA's legislative history. Congressman Anderson, floor manager of the ADA in the House, admonished: "It was not the intent of the House Conferees to limit in any way the normal exercise of a proprietor's powers to determine the level and nature of service to be provided at airports, subject to constitutional and statutory limitations. . . . "[1] 124 CONG. REC. 38,526 (1978) (House debate). During a specific discussion of the cities' Concurrent Bond Ordinance, Congressman Anderson again cautioned that the ADA should not be interpreted to conflict with the agreement:

> [Congressman Wright]: As I understand it, the 1968 Regional Airport Concurrent Bond Ordinance of the two Cities specifically contains a regional airport plan which absolutely precludes the use of Love Field or Meacham Field for interstate or foreign flights. I am insistent that this decision shall be respected and that nothing be done to place it in jeopardy.
>
> Now, if the CAB were to be allowed nevertheless to certificate any service into Love Field, let us say, then there would be a very serious concern that it could become a major air carrier airport once again, and that service would be drawn away from the Dallas-Fort Worth Airport into which all the cities' moneys and their futures have been pledged, to the serious inconvenience of Fort Worth passengers and also to the serious financial detriment of the cities of Dallas and Fort Worth and their ability to pay

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[1] As a Manager for the House, Mr. Anderson's remarks about the ADA are entitled to substantial weight. *See Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 14-16 (1976).

> off the Dallas-Fort Worth Airport bonds. I want to leave no possibility that any future administration or board member could misconstrue any language in this bill as encouraging or permitting such a travesty.
>
> I should like to ask the manager of the bill, the gentleman from California (Mr. Anderson): Am I correct in understanding that if the Dallas-Fort Worth Regional Airport Board or the cities inform the CAB that any interstate service to Love Field is not in accordance with the plan of the 1968 [Bond] Ordinance, and that they do not desire it, then the CAB could not certificate any such service to Love Field or to Meacham Field?
>
> * * *
>
> Mr. Anderson of California. Mr. Chairman, my understanding of the language is as the gentleman stated it.

124 CONG. REC. 30,670 (1978).

Disregarding congressional intent, Respondents argue the Love Field perimeter rule cannot be enforced because proprietary powers may only be used to regulate matters such as noise. DOT goes so far as to declare that "no court has ever held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition." [DOT 10][2]

Respondents cannot reconcile their views on proprietary rights, or the Fifth Circuit's opinion, with earlier decisions interpreting the ADA. In *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, the court refuted the notion that airport owners may use proprietary powers only to deal with environmental matters such as noise. 658 F. Supp. 952, 956-57 (S.D.N.Y. 1986),

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[2] "DOT ___" refers to the Department of Transportation's Opposition Brief. "FW ___", "FW App ___", and "AA App ___" refer to Fort Worth's Petition, Fort Worth's Appendix, and American's Appendix.

*aff'd*, 817 F.2d 222 (2d Cir. 1987). The court concluded that a perimeter rule could be imposed "to reduce ground congestion ***and maintain LaGuardia as a short and medium haul airport by diverting longer haul air traffic to Kennedy and Newark.***"[3] *Id.* at 953 (emphasis added).

Likewise, the stated purposes of the perimeter rule upheld in *City of Houston v. FAA* were "(1) ***to assure the full utilization of Dulles; [and] (2) to preserve the short- and medium-haul nature of National.*** . . . " 679 F.2d 1184, 1188 (5th Cir. 1982) (emphasis added). And while Respondents suggest *City of Houston* would have been decided differently had the perimeter rule been imposed by a local proprietor (and not the FAA), the FAA advised the Fifth Circuit otherwise in its brief:

> Houston is simply incorrect in suggesting that any other airport proprietor could not, under the [proprietor exemption], impose operating restrictions of this type.
>
> * * *
>
> [T]he Government's position in this case in no way differs from its long-held view that an airport proprietor may discriminate between types, kinds and classes of aeronautical usage when the proprietor operates more than one airport and seeks merely to differentiate between types of air service at the different airports.

Response of the FAA in *City of Houston v. FAA*, No. 80-2030 at 23-25 n.28 (5th Cir., filed May 26, 1981).

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[3] Respondents allege the Second Circuit retreated from *Western Air Lines* in *National Helicopter Corp. of America v. City of New York*, where the court held that a local regulation could not define the precise route a helicopter may fly over the city. 137 F.3d 81 (2d Cir. 1998). At the same time, the court recognized the city's proprietary right to control the size of its heliport by upholding a regulation designed to reduce the number of operations at Manhattan Airport. *Id.* at 90-91.

Equally unpersuasive are efforts to distinguish *Arapahoe County v. Centennial Express Airlines*, 956 P.2d 587 (Colo. 1998). DOT first argues the opinion does not conflict with the lower court's decision, though the Fifth Circuit itself acknowledged the conflict. [FW App 36 ("[W]e view that case as deviating from the generally accepted rule we adopt here.")] DOT then suggests the state court's interpretation of proprietary rights "was not essential to the court's holding." [DOT 23] But DOT cannot escape the court's ultimate determination: an airport proprietor may restrict scheduled passenger service at one airport to prevent competition with a nearby regional airport.

There are unmistakable conflicts between the Fifth Circuit's decision and the opinions in *Western Air Lines*, *Arapahoe County*, and *City of Houston*. The need for this Court to review and resolve the conflict is best evidenced by the diverging views of proprietary rights in the ten briefs submitted thus far.

## II. DOT HAS FAILED TO RECONCILE ITS OWN CONFLICTS REGARDING PROPRIETARY RIGHTS

Perhaps the most troubling aspect of this case is the absolute inconsistency of DOT itself. With respect to all other airports, like those in West Virginia and Austin [FW 16-17], DOT has steadfastly acknowledged that the public interest suffers when scheduled passenger service is fragmented between nearby competing airports, and that local authorities may implement rules to prevent competition. DOT fails to explain why Love Field and DFW Airport, which are separated by twelve miles, should be regarded differently. DOT states only that it "has determined that competition between the two airports in the Dallas-Fort Worth area serves the public interest and does not significantly harm DFW Airport." [DOT 22 n.17]

Remarkably, DOT has conducted no hearings, undertaken no studies, and hired no experts to support its view

that there will be no adverse effects on DFW Airport or the citizens of Dallas and Fort Worth. In contrast, it took CAB several years of extensive studies and public hearings to determine that neither Love Field nor Greater Southwest could accommodate the future commercial air traffic in Dallas-Fort Worth [AA App 172A], and that "the public convenience and necessity require . . . that Dallas and Fort Worth be served through a single airport." [AA App 170A]

DOT would disregard CAB's findings, as well as the contracts that provide the financial underpinning of DFW Airport, on the bare premise that the ADA was intended to encourage competition.[4] The quest for greater competition, however, does not justify a groundless interpretation of the ADA, the effect of which would be to discourage, if not eliminate, regional planning. The policy of the ADA is to encourage competition among *airlines*, not *airports*. Competition is favored "only to the extent that it complements and aids the overall policy of the [ADA], ***which is to develop a sound air transportation system.***" *Big Bear Cartage, Inc. v. Air Cargo, Inc.*, 419 F. Supp. 982, 986 (N.D. Ill. 1976) (emphasis added).

If allowed to stand, the Fifth Circuit's decision will greatly expand ADA preemption. The underlying DOT order provides that the perimeter rule may be upheld only if essential to DFW Airport's "viability." [FW App 111-113] Although DOT claimed its decision was based on "existing case law," [FW App 91-92], this extraordinarily high burden has never been articulated as the standard by which airport proprietors may implement regulations. The Colorado Supreme Court and the Second Circuit imposed no such constraints in determining that local airport proprietors may consolidate long-haul

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[4] Legend and Southwest, if really serious about competition, could offer service at DFW Airport like all other airlines rather than seeking a federally-protected niche at Love Field.

scheduled passenger service at one airport and maintain other airports as short-haul and general aviation facilities.

In addition to contradicting settled case law, DOT's interpretation of the ADA defies common sense. DOT argues that Dallas and Fort Worth did not prove that the restrictions at Love Field are "currently needed."[5] [DOT 19 n.16] Under this reasoning, airport proprietors bear the burden – presumably forever – of reestablishing the necessity of a restriction each time a new carrier seeks to offer unrestricted service. There is no authority to suggest that an airport operator, having previously studied noise, congestion, and safety, and entered into long-term financial commitments, must continually prove the need for its regional plan. *Compare Western Airlines*, 658 F. Supp. at 960 (testing validity of perimeter rule at time rule was imposed).

Further, there can be no serious dispute that large volumes of traffic will be diverted from DFW Airport to Love Field, along with substantial revenue needed to retire the bonds sold to build DFW. The flurry of activity at Love Field caused by the Fifth Circuit's decision has been well-chronicled. *See, e.g.*, Dallas Morning News, May 2, 2000, at 1D; Dallas Morning News, May 27, 2000, at 1A. Legend is nearing completion of its new terminal and has already instituted long-haul service to both

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[5] Although the Fifth Circuit concluded DOT complied with "the minimum procedural notice requirements," [FW App 12], DOT provided no notice that the proponents of the perimeter rule would be required to submit evidence supporting the rule, and certainly gave no hint that those parties must establish a threat to DFW Airport's "viability." DOT styled its action as an "interpretation" proceeding and announced it would rule on "straightforward statutory interpretation issues." DOT denied requests for oral argument, denied a request for an environmental impact study, and denied a request for abatement pending an analysis of air traffic congestion in the Dallas-Fort Worth area.

coasts; American has remodeled three gates and begun its own interstate service; Continental has started limited interstate service and is offering through-ticket service to much of the world through its Houston hub; and Delta and Comair have announced plans to offer interstate service in the near future. The threat posed by Love Field is best evidenced by Delta's recent quote on the front page of the May 27 edition of the Dallas Morning News: **"Love Field certainly provides an attractive alternative to DFW Airport."**

## III. THE PROPRIETARY RIGHTS PROVISION OF THE ADA APPLIES TO THE FLIGHTS PERMITTED BY THE WRIGHT AND SHELBY AMENDMENTS

Respondents also attempt to manufacture preemption under the Wright and Shelby Amendments, which merely permit DOT to certificate certain flights at Love Field. Nothing in the text of the Wright or Shelby Amendments, however, addresses preemption or proprietary rights. The only statement regarding either comes from the conference report accompanying the Wright Amendment, wherein Congress expressly declared that the proprietary rights provision of the ADA applies to Love Field:

> [T]he preemption and proprietary rights provisions of [the ADA] apply to the authority to serve Love Field on interstate flights authorized by the amendment.

H.R. CONF. REP. No. 96-716 at 26 (1979), *reprinted in* 1980 U.S.C.C.A.N. 78, 88.

Congress could not have intended to impliedly preempt the cities' proprietary powers if it specifically provided that those powers be preserved. Indeed, the purpose of the Wright Amendment was not to mandate flights at Love Field, but to prevent CAB/DOT from certificating flights inconsistent with the cities' regional airport plan. The Wright Amendment provides a general

prohibition on certification, then sets forth several exceptions where certification would be *permissible*. Likewise, the Shelby Amendment merely redefined the "commuter airline" exception of the Wright Amendment to allow certification of aircraft reconfigured to have fifty-six seats or less.

To be sure, DOT certification conveys no affirmative rights. In fact, the ADA's reservation of proprietary powers expressly contemplates that such powers will be exercised with respect to ***"an air carrier holding a certificate issued by the Secretary of Transportation."*** 49 U.S.C. § 41713(b)(3) (emphasis added). At LaGuardia Airport, for example, certificated air carriers must comply with the perimeter rule enacted by the Port Authority and upheld by the Second Circuit in *Western Air Lines*. 817 F.2d 222 (2d Cir. 1987).

## IV. THERE IS A CONFLICT AMONG FEDERAL COURTS REGARDING THE APPLICABILITY OF 28 U.S.C. § 1738 TO ADMINISTRATIVE AGENCIES

As Fort Worth noted in its petition, there is disagreement among federal courts regarding the applicability of the full faith and credit statute, 28 U.S.C. § 1738, to administrative agencies. [FW 22-26]. Tacitly acknowledging the conflict, the Fifth Circuit decided the "better rule" was that section 1738 should not apply to administrative agencies. [FW App 17-18 n.6] Fort Worth believes this issue of first impression merits review by the Court.

The importance of this question remains unchanged even though the state court of appeals, by a divided panel (with a written dissent), reversed the trial court and held that it must defer to DOT's construction of the ADA.[6] Although the state court action is nearing resolution, it is not over. Fort Worth has requested *en banc*

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[6] The dissent concluded the Concurrent Bond Ordinance was enforceable, and recognized that the cities' ability to repay

review of the majority panel's decision, and an appeal to the Supreme Court of Texas is still upcoming. But regardless of how the state court action concludes, it was wrong for DOT to attempt to usurp the authority of the state courts by injecting itself into this dispute, and by ignoring the state court's prior judgment.

Though DOT alleges its actions were justified because of "important national interests," DOT waited almost one year after the state court lawsuit was filed before initiating its proceeding. As the Fifth Circuit noted: "These key federal interests are arguably lessened by the fact that DOT did not attempt to stay or intervene in the state court action; presumably, if the federal interests were that important, DOT would have taken one of these actions." [FW App 22 n.8]

## CONCLUSION

The petition for writ of certiorari should be granted.

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DFW Airport bonds will be affected by the diversion of revenue from DFW to Love Field. *Legend Airlines, Inc., et al. v. City of Fort Worth, et al.*, No. 2-99-098-CV, 2000 WL 679,286 (Tex.App. – Fort Worth 2000) (Dauphinot, J., dissenting).